Petition

81-1833

Supreme Court, U.S.
FILED
APR 2 1982
ALEXANDER L. STEVAS
CLERK

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

PEOPLE OF THE STATE OF MICHIGAN
Petitioner,
-vs-
NORMAN PAINTMAN,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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QUESTIONS PRESENTED

I

Whether the requirements of *Miranda* v *Arizona*, 384 US 436 (1966), should be replaced by a test which focuses upon whether a confession was the product of compulsion or coercion?

II

Whether the decision in *Edwards* v *Arizona*, 101 S Ct 1880 (1981), should be given retroactive effect?

III

Whether a balancing test should be employed to determine the admissibility into evidence of confessions which were voluntary but were obtained in violation of the Miranda rules?

TABLE OF CONTENTS

	Page
Questions Presented	i
Index to Authorities Cited	iv
Citation to Opinions Below	1
Jurisdiction	1
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Granting the Writ	11
Relief Requested	27
Appendix	29
Opinion of the Michigan Supreme Court (February 1, 1982)	29
Opinion of the Michigan Court of Appeals (September 19, 1979)	43
Judgments of Conviction and Sentence of Trial Court (April 1, 1977)	50
Order of the Michigan Supreme Court denying Respondent's Application for Leave to Appeal (October 28, 1976)	53
Order of the Michigan Court of Appeals granting Respondent's Motion for Rehearing and affirming order reversing trial court (August 26, 1976)	54
Order of the Michigan Court of Appeals reversing trial court (August 20, 1976)	55

Page

Order of trial court holding Respondent's statements inadmissible (July 30, 1976) 56

Oral pronouncements of trial court on rehearing holding Respondent's statements inadmissible (July 30, 1976) 57

Oral ruling of trial court holding Respondent's statements inadmissible (July 29, 1976) 68

INDEX OF AUTHORITIES CITED

Cases:

Brown v Illinois, 422 US 590 (1975) 18

Bruton v United States, 391 US 123 (1968) 3

Cicenia v Legay, 357 US 504 (1958) 19

Crooker v California, 357 US 433 (1958) 19

Edwards v Arizona, 101 S Ct 1880 (1981) 12,13, 21-27

Escobedo v Illinois, 378 US 478 (1964) 17

Griffin v California, 380 US 609 (1965) 12,15

Johnson v New Jersey, 384 US 719 (1966) .. 20,21,24

Johnson v Zerbst, 304 US 458 (1938) 12,19

Linkletter v Walker, 381 US 618 (1965) 20

Michigan v Mosley, 423 US 96 (1975) 21,22,23

Michigan v Tucker, 417 US 433 (1974) 18

Miranda v Arizona, 384 US 436 (1966) 6,12,13 16,17,18,21,23,25,27

Page

Palko v Connecticut, 302 US 319 (1937) 19

People v Paintman, —— Mich —— ( ) i

Stone v Powell, 428 US 465 (1965) 27

Stoval v Dennis, 388 US 293 (1967) 21

Tehan v United States ex rel Shott, 382 US 406 (1966) 20

United States v Johnson, 626 F2d 753 (CA, 1981) *cert. grntd.*, 102 S Ct 89 (1981) 19

Wainwright v Sykes, 433 US 72 (1977) 18

Statutes:

MCL 775.16 6

Constitutional Provisions:

US Const, Am V 2,17,22,23,25-26

US Const, Am XIV 2

Other:

Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v California After Fifteen Years*, 78 Mich L Rev 841, 852-866 (1980) 14

Bernick, *Of Crime and Conscience*, 68 ABA Jour. 306 (1982) 16

Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U Pitt L Rev 731, 734-735 (1981) 12

Justice Schaefer, *The Suspect and Society*, 70-71 (1967) 14

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CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court was filed on February 1, 1982, and is reported at — Mich — ; — NW2d (1982). That decision reversed a decision of the Michigan Court of Appeals filed on September 19, 1979, which is reported at 92 Mich App 412; 285 NW2d 206 (1979).

JURISDICTION

The judgment of the Michigan Supreme Court was filed on February 1, 1982. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which this petition involves is the compulsory self-incrimination clause of the Fifth Amendment, made applicable to the states under the due process clause of the Fourteenth Amendment:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

STATEMENT OF THE CASE

Respondent Norman Paintman was convicted by a jury of four counts of first degree murder in the execution-style slaying of three adult males and one small female child, and on April 1, 1977, he was sentenced to mandatory life imprisonment with no possibility of parole. His inculpatory statements were critical evidence against him at his trial, and it is the admissibility into evidence of those statements which is at issue in this petition.

The murders occurred on Monday, February 23, 1976, at 16200 Carriage Lamp Court, Apartment 706, in the City of Southfield, County of Oakland, State of Michigan (T. 139)[1]. The adult victims were Floyd A. McElhannon, the occupant of the apartment; Ronald R. Brown, and Theodoro Nelson. The child was Andrea Brown. All four died of multiple gunshot wounds to the head fired from close range while the victims were lying on the floor (T. 113-128, 131-132, 141; Ex. 10-16, 19). There were no signs of struggle at the scene, and no signs of injury or trauma to other parts of the victims' bodies or clothing (T. 113-128, 142, 197). Each of three adult decedents had traces of morphine or heroin in his body (T. 130).

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[1] Two separately-numbered transcripts are involved in this appeal. The transcript of trial is designated (T.). The transcript of the hearing on the admissibility of Respondent's statement is designated (H.).

The bodies were discovered by Arthur Lee Sailes, a twenty-nine year old Army veteran, ex-convict, and user and seller of heroin (T. 233-234, 247, 520-521). Sailes had gone to the apartment to purchase heroin from Floyd McElhannon, which was his daily practice (T. 235).[2] At about 12:30 P.M., as he approached McElhannon's apartment building in his car, he observed, from a distance of approximately 100 yards, Respondent and one William Kidd[3] exit the building together (T. 238-240). Kidd was slightly in front of Respondent, and both were facing Sailes (T. 240, 287). As Sailes approached to within 80 feet of them, he observed that Kidd "seemed kind of angry" (T. 241, 243, 285-287). Respondent had a trench coat draped over his shoulders, and a shiny object in his hand which Sailes could not identify further (T. 241). They walked "kind of hurriedly" to Kidd's car, entered it, and pulled away immediately "as if the car was running," with Kidd driving (T. 241-242).

After going to McElhannon's apartment and discovering the bodies, Sailes went home to call the police, but his call was not completed (T.247). When he later drove by McElhannon's apartment building and saw that the murders had not been discovered (T. 248, 267-268), he called the police again, and, using a false name, directed the police to the location of the murders (T. 248, 269).

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[2] It is clear from the record that Floyd McElhannon was a full-time heroin dealer who sold primarily to street-level dealers (T. 170, 235, 249).

[3] Respondent and William Kidd were granted separate trials, insofar as the confession of each one tended to place the responsibility for the shootings on the other. Cf. *Bruton* v *United States*, 391 US 123 (1968). Kidd was convicted in a bench trial of four counts of second-degree murder, and was sentenced on April 11, 1977, to life imprisonment with the possibility of parole. He has never appealed that conviction, and no transcript of his trial has ever been prepared.

In response to this telephone call, the police arrived at the scene at about 4:00 or 4:30 P.M. on February 23, 1976, and discovered the bodies as described above (T. 139-142, 145-146, 190-197). The only identifiable fingerprints found at the scene were those of Floyd McElhannon, the deceased occupant of the apartment (T. 193, 206-207). The fatal shots had been fired from two different pistols.[4] (T. 118, 148-150, 196-203, 460-475). There was no evidence found at the scene which tended to identify the perpetrators.

Arthur Sailes called the Southfield Police Department again two days later, on Wednesday, February 25, 1976, and spent several hours at the police station later that day relating his story. (T. 248, 288-294). He stated that he had known William Kidd for four to six months prior to the shooting, but did not know the other man (i.e., Respondent) by name, and to the best of his knowledge had never seen him before (T. 247-248). He described various arguments, threats, and narcotics transactions between Kidd and Floyd McElhannon (T. 249-260).

The Southfield Police, based upon the information which Sailes relayed to them, arrested William Kidd on Thursday, February 26, 1976 (T. 315). On that same day, Kidd gave police a taped statement in which he admitted his involvement but placed the brunt of the responsibility upon Respondent. He claimed that the two of them went to the apartment of Floyd McElhannon, and that he held the adults and the child at gunpoint while Respondent searched the apartment. He stated that, having accomplished this robbery at gunpoint, he was "shocked" and "terrified" when

[4] On February 27, 1976, the day after William Kidd was arrested, Kidd led the police to his pistol, a .38 caliber Smith & Wesson revolver with five notches carved into the handle (T. 311-315). These notches, Kidd had told Arthur Sailes, each represented "the perfect crime, the perfect kill" (T. 250). Ballistics tests showed that this gun was one of the murder weapons (T. 460-474). The other pistol, which the evidence suggests was an F.I.E. Titan Tiger, manufactured in Miami, Florida, was never recovered (T. 367, 463, 471-475).

Respondent began shooting the people who were present. Kidd was emphatic in his claim that it was Respondent, not he, who shot the baby (H. 146-150). Kidd also led police to his gun and to his car (T. 311-315, 442-443).

Because of Kidd's statement, a team of Detroit and Southfield officers arrested Respondent at a home in Detroit shortly after midnight in the early morning hours of Friday, February 27, 1976 (T. 388-389; H. 18-19, 103). He was taken immediately to the 12th Precinct in Detroit, remained there for five minutes or less, and then was transported directly to a lockup cell at the Southfield Police station (H. 103-107). The officers who arrested him told him that he was being arrested for four counts of first degree murder, and that anything he said could be held against him (H. 107).

Shortly thereafter, at 2:00 or 2:30 A.M. on February 27, 1976, Captain Edward Ritenour introduced himself to Responent (H. 18-19). At that time, Ritenour saw Respondent in order "to establish [that] conditions were proper," and told Respondent why he was arrested, that he was a suspect, that he wanted to ensure Respondent's comfort, and that he "had intentions of later talking with him about the case," and that if there were anything Respondent wished to talk to him about, he "would probably see him the next morning and we could discuss it then" (H. 21-22).

At about 10:00 A.M. the next morning, the 27th of February, Respondent was transported from the Southfield Police station to the prosecutor's office (H. 22-23). Ritenour asked Respondent how he was feeling, but neither asked nor said anything about the facts of the case at the police station or enroute to the prosecutor's office (H. 108). Respondent was taken to the prosecutor's office, was read his *Miranda* rights, and then the tape of William Kidd's statement was played for him. (H. 23-24, 145). While the tape was being played,

Respondent said, "I ain't got nothing to say." After the tape was finished, Prosecutor Richard Thompson asked if Respondent wanted to waive his rights and make a statement, and Respondent said no, that he wanted to talk to a lawyer. Thereafter Thompson left the room. (Ex. A; H. 67, 110, 151)

Captain Ritenour then described the crime to Respondent in "some detail," told him that the police were aware of the circumstances under which the victims had died, and said that he was "interested in determining [Respondent's] participation in that particular crime" (H. 67). Later that afternoon, Respondent was identified in a lineup by Arthur Sailes (T. 300, 321-322, 414-415), and was thereafter arraigned before a district court magistrate on a complaint and warrant charging him with four counts of first-degree murder. At that arraignment he completed the necessary paperwork to get court-appointed counsel (H. 35, 155, 160-161, 164; T. 397).[5] Ritenour informed Respondent of the results of the lineup (T. 415).

At about 7:00 P.M. that evening, still Friday, the 27th of February, Ritenour "check[ed] on" Respondent, who was still in a cell at the Southfield police station awaiting transportation later that evening to the Oakland County Jail (H. 34-35). Ritenour wanted to make sure Respondent was comfortable, and asked him if everything was okay, "if he felt all right" (H. 35). Respondent stated that he was experiencing some symptoms of withdrawal from narcotics and had "somewhat of a headache" (H. 35, 111-112). Ritenour told Respondent to bring his condition to the attention of personnel at the county jail for care (H. 35, 113). Ritenour

[5] The court-appointed counsel requested at this arraignment is for representation at preliminary examination and trial. See Michigan Compiled Laws 775.16, Michigan General Court Rule 785.4. This request has nothing to do with a Fifth Amendment right to counsel under *Miranda* v *Arizona*, 384 US 436 (1966). Respondent's preliminary examination took place on March 5, 1976, at which time he was bound over to circuit court for trial.

said that he "would like to talk about the incident" with Respondent, but that he realized it was getting late in the evening and he understood Respondent was not feeling well. Ritenour told him that he would try to get to the jail within the next two days or so, and if Respondent "felt like discussing the matter, we could do it at that time" (H. 35,113). Respondent thanked Ritenour for his concern, stated that he really didn't feel like talking to anyone at that time because of his condition, but that he "may decide later to talk" with Ritenour about it, "and possibly [Ritenour] should stop at the County Jail" (H. 36).

Three days later, on Monday, March 1, 1976, at 10:00 or 10:30 A.M., Captain Ritenour called the jail and asked a "turnkey" to "ask Mr. Paintman if he cared to discuss anything with me." After a brief wait, the guard returned to the phone "and said, 'No' " (H. 39). Ritenour, however, "didn't trust the circumstances." He reasoned that Respondent would not tell the "turnkey" he wanted to talk to the police even if he did want to talk. Ritenour "didn't want to pass the opportunity to really talk to Mr. Paintman in case he did want to talk to someone," and he wanted to ask Respondent directly (H. 39). Ritenour therefore went to the jail with Det. Lt. Jerry Simmons.

Captain Ritenour and Lt. Simmons, once at the jail, obtained an interview room, and told a guard to "go in and tell Norman Paintman that I was there and I wished to talk to him," and that "if he cared to talk with me, to come to the interview room." (H. 40). Respondent came to the interview room. Ritenour asked about his condition, and Respondent stated "that he felt a lot better," and that "his head was clear, no headache" (H. 41). Ritenour stated that Respondent's eyes were clear and that he did not appear to be lethargic (H. 52).

After handshakes, the introduction of Respondent to Lt. Simmons, and an exchange of pleasantries (H. 41-42;

T. 360-361), Ritenour referred to their previous conversations in which he had expressed a wish "to talk with him about this particular incident," and stated that his reason for being there on that day "was to check with him again and see if he cared to discuss the incident" with him (T. 362). Respondent began to tell Ritenour "some facts about the crime involved," and said it was "not his idea to go to the apartment" (T. 362). Ritenour interrupted him and began to advise him of his rights, but Respondent in turn interrupted Ritenour, stated that he understood his rights, and wanted to get on with the story (H. 48-49, 362-363). Ritenour was finally able to recite the rights in full and to obtain a waiver of them by Respondent, after asking Respondent to pay him the "professional courtesy" of allowing him to do so (H. 55-64, 93-94; T. 363-364), and Respondent then gave a statement.

Respondent complained that other prisoners and guards at the jail were calling him a baby killer,[6] and he stated "emphatically" that he did not kill the child (T. 371-372, 428). He stated that he was asked by William Kidd to go with him to an apartment in Southfield where "Floyd" lived. Floyd dealt in narcotics, and they were going to hold up or "rip off" Floyd for money and drugs (T. 365). Thereafter they planned to kill Floyd, to "hit him" after they robbed him (T. 365, 429). Respondent said that Kidd owed Floyd money, was tired of being "pushed around" by Floyd, was afraid to go there alone, and wanted Respondent as a back-up (T. 365-366).

Respondent said that he and Kidd drove to Floyd's apartment in Kidd's car, and that Kidd, keeping his own

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[6] When Respondent said this, Ritenour asked if he wanted to be moved or helped in any other way. Respondent said that he did not (T. 416).

.38 revolver, gave Respondent a handgun with "Miami, Florida" stamped on it (T. 366-367, 429). Kidd entered the front door as Respondent entered the back, and, as they reached the second floor, some man asked them what they were looking for (T. 367-369). Kidd forced the man into the apartment at gunpoint, and, again at gunpoint, the two of them told the three men and the one child to lie down (T. 369). While Kidd "covered" the people on the floor, Respondent searched the apartment, and found some narcotics, al out $800.00 in cash, and an automatic pistol (T. 370). As Respondent returned to the living room, one of the men said, "Hey, man. No dope is worth this . . . Why didn't you tell me that you were hurting and I would fix you up?" Respondent then said to Kidd, "Okay, man. You know what we came for" (T. 370-371). Kidd then began shooting, Respondent began shooting, and both emptied their guns shooting at the people on the floor (T. 371, 428). They left, divided the money and drugs, and Respondent later threw his gun and the automatic pistol which he had taken into the Detroit River (T. 371-372). Respondent emphasized that he had not shot the child, stating, "I don't hold for senseless killing that way." Killing might be alright under different circumstances,[7] but he "didn't hold with

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[7] Captain Ritenour and Lt. Simmons included in their written report of their interview with Respondent, but not in their testimony at trial, Respondent's statement to them to the effect that it would have been all right to kill this way "on a contract job" because of the "excitement" and "adventure" involved. He stated that Kidd needed to "waste" McElhannon because McElhannon knew him and would "order a contract" on him if he didn't, but "there was no baby supposed to be in the deal." Respondent also admitted to having held up many "dope pads" without having killed the operators, since he knew that they could not report the robberies to the police. If one of the victims recognized him and "bought a contract" on him which he thought was unfair, he could go to Leroy Jackson and get the contract cancelled. Respondent identified Leroy Jackson as the "Godfather" living in Southfield, and as the man to whom "all big dope dealers" go to solve their "street problems." This written police report was admitted into evidence by stipulation at the hearing on Respondent's confession (P. Ex 1; H. 70), and Respondent included it as his Appendix II in his appeal to the Michigan Supreme Court.

killing a child" (T. 372).[8] Ritenour noted a "sadness" in Respondent's eyes when he spoke of the killing of the baby (T. 372). The entire meeting took about one-half hour (H. 46, 117; T. 372).

Prior to trial a hearing was held to determine the admissibility into evidence of Respondent's inculpatory statements of March 1, 1976. Following that hearing, the trial court ruled that Respondent's statements were "non-voluntary" (H. 184) or "involuntary" (H. 200-201, 207), and that ruling was embodied in a written order which stated that Respondent's statements were "held to be inadmissible as involuntary for the reasons set forth on the record."[9]

The prosecution took an interlocutory appeal to the Michigan Court of Appeals, and on August 20, 1976, that court reversed the order of the trial court, holding that it was "left with a definite and firm conviction that the statements of" Respondent "were voluntarily given and may be admitted at trial." (App. 55)

On August 26, 1976, the Court of Appeals granted Respondent's motion for rehearing, but affirmed its order of six days earlier reversing the trial court. (App. 54).

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[8] At the hearing on the admissibility into evidence of his statements, but not at trial, Respondent disputed the version of his story which Capt. Ritenour and Lt. Simmons related. He claimed that after he and Kidd had robbed the people, he left the apartment ahead of Kidd, and as he was walking down the hallway he heard several gunshots, and Kidd thereafter told him that he had killed all the people (H. 115-130).

[9] Because of their importance to the issue on this appeal, the trial court's oral rulings of July 29 and 30, 1976, are reprinted in full (App. 57). From that lengthy colloquy, it is clear that the court's only findings of fact concerned the dates of certain events, such as arrest, questioning, and arraignment, which were not in dispute (H. 210). It is also clear that the trial court's ruling that the statements were "non-voluntary" or "involuntary" was purely a conclusion of law based upon the *Miranda* rules (H. 200-201, 206-207, 208-211, 213-214).

On October 28, 1976, the Michigan Supreme Court denied Respondent's application for leave to appeal, with two justices dissenting. (App. 53)

Respondent's jury trial began on March 8, 1977. Most of the prosecution's case against him has been set forth above. The prosecution also showed, however, in an argument which is difficult to reduce to print because it is based in large part upon photographs which were in evidence, that the victims were killed by two gunmen, firing two separate pistols, standing at two distinct positions in Floyd McElhannon's living room (T. 113-132, 191-203, 457-475, 552-553, 571-572, 580, 606, 615-617, 620-621; Ex. 10-16, 19).

Respondent elected not to testify at his trial (T. 540-542).

On March 21, 1977, Respondent was found guilty of four counts of first-degree murder (T. 698-696), and on April 1, 1977, was sentenced to mandatory life imprisonment with no possibility of parole. (App. 50)

On September 19, 1979, the Michigan Court of Appeals affirmed Respondent's conviction. The court held that its earlier ruling reversing the trial court on the issue of Respondent's statements "is the law of the case and is controlling." (App. 43)

On February 1, 1982, the Michigan Supreme Court reversed Respondent's conviction in a unanimous opinion. (App. 29)

REASONS FOR GRANTING THE WRIT

I

The Michigan Supreme Court reversed Respondent's conviction under the Fifth and Fourteenth Amendments, holding that once Respondent had invoked his right to

counsel during questioning at the prosecutor's office, it was improper under *Miranda* v *Arizona*, 384 US 436 (1966), and *Edwards* v *Arizona*, 101 S Ct 1880 (1981), for Captain Ritenour to "instigate a reinterrogation" of him three days later. The Court believed that this impropriety was aggravated by the fact that, when Ritenour called the jail before going there, he was informed that Respondent did not wish to speak with him. The Court concluded that the record did not contain "a clear demonstration of waiver" of Respondent's Fifth Amendment right to counsel once that right had been asserted.

The Petitioner contends that an imbalance exists in the law of confessions and interrogations as a result of this Court's decision in *Miranda*. It is not absolutely clear that Respondent's statements would be admissible even under a perfect system of Fifth Amendment jurisprudence, but Captain Ritenour's efforts in obtaining them deserve to be judged by standards which recognize the importance to society of confessions, admissions, and inculpatory statements, and which acknowledge the legitimacy of some police methods of obtaining them. At the same time, effective judicial remedies should be available and should be used to protect the rights of accused persons, especially those who are guilty, but in the formulation and employment of those remedies, no weight whatever should be given to one of the "interests" which suspects have — that of not being convicted even if guilty.[10] A system which evaluates these factors in a different light could at least entertain the possibility that Captain Ritenour did a commendable job in solving this case without violating a subject's Constitutional rights, and, even if it ultimately ruled Respondent's confession inadmissible, it could not fairly describe the police conduct in this case in the tone of indignation which the Michigan Supreme Court has used.

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[10] Frey, *Modern Police Interrogation Law: The Wrong Road Taken*, 42 U Pitt L Rev 731, 734-735 (1981).

We are asking the Court to draw distinction of Constitutional significance between, on the one hand, legitimate interrogation techniques and permissible factors which may motivate or impel a guilty person to confess, and on the other, those which amount to compulsion or coercion. It is the premise of *Miranda* which treats all of these factors as components of compulsion, found to inhere in custodial interrogation, that we are asking the Court to reject. If the Court accepts the validity of this distinction, then the central determination would be whether a confession was compelled within the meaning of the Fifth Amendment. If it clearly was not, then no question of a waiver of the privilege against compulsory self-incrimination would be present, since the right cannot be "exercised" absent some form of compulsion. In cases that are not clear, the prosecution would have to show a waiver within the meaning of *Johnson* v *Zerbst*, 304 US 458 (1938), of the Fifth Amendment right.

Among the factors which Petitioner contends are legitimate are an explanation of the evidence against the suspect, indications to him that cooperation with the police may be beneficial, an appeal to his conscience or sense of right and wrong, and an indication to him that his refusal or inability to explain the evidence against him will be given some consideration in his case. We say "given some consideration," without saying how much or by whom, because it is not clear whether the Court is willing to retreat at all from the rationale of *Griffin* v *California*, 380 US 609 (1965).

The inference of guilt from silence is impermissible under *Griffin* and under *Miranda*, 384 US, at 468 n. 37. The court recognized that a defendant's silence is likely to play a role in the factfinder's determination of guilt, but held that the Fifth Amendment required that the impact of that silence be minimized. The difficulty remains nonetheless, because the *Griffin* problem differs qualitatively from others involving logical analysis. It requires the conscious disregard of a known fact which

logic and human experience says is relevant to the determination at hand. As such, it intrudes directly into the thought processes and leaves an unsettling feeling that facts are not being faced honestly:

> "[U]ndue emphasis upon the accusatorial aspects of our system has an embarrassingly parochial quality. Most nations of the world do not rely upon a system that is wholly accusatorial, nor do they go to the other extreme. Instead they require that the silence of an accused be noted for consideration in the ultimate determination of guilt or innocence. They neither require that he take an oath nor do they employ contempt as a sanction for his failure to answer. These rules seem to me to follow natural assumptions. The silence of the accused is noted and taken into account because of the strength of the inference of guilt that flows from his failure to respond; the refusal to administer an oath to the accused, or to force him to answer, reflects spiritual and physical aspects of the law of self-preservation invoked by John Lilburn before the Star Chamber. The epithet "inquisitorial" evokes the image of historic abuses that are not relevant to an obligation to respond to orderly inquiry."
>
> Justice Schaefer, The Suspect And Society 70-71 (1967)

The rule creates a number of collateral problems as well.[11]

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[11] See generally Ayer, *The Fifth Amendment and the Inference of Guilt from Silence: Griffin v California After Fifteen Years*, 78 Mich L Rev 841, 852-866 (1980).

The *Griffin* principle, in combination with the right to counsel at questioning, creates the situation wherein the guilty defendant who fully exercises his rights has the opportunity to consult with counsel before ever giving his version of events. It is widely believed that this is conducive to lying. The guilty defendant may give his version of events for the first time after the prosecution has rested its case, and the prosecution is not able to impeach him with any prior statements or with his silence in the face of an accusation, and must investigate his story on short notice and in the midst of trial pressures. This system evolved during a period when the overwhelming trend has been toward greater disclosure of evidence on the part of the prosecution and of the parties to civil cases. The *Griffin* rule has a destructive impact on the truth-seeking process, and rests upon the questionable premise that the presentation of a strong case against an accused inflicts "compulsive" pressures upon him to incriminate himself.

We are asking that police be allowed to tell a suspect that his refusal or inability to explain the evidence against him will be taken into account in the determination of his guilt or innocence. If that is asking too much, and the *Griffin* principle is to remain completely intact, the police could still in all honesty tell a suspect that his silence may play some role in the police decision to investigate further or to seek charges against him, and in the prosecutor's decision to authorize charges. If it is true that his cooperation might be beneficial to him, he should be told so. These represent honest explanations by the police of how they function. There is nothing illegal or unethical about these practices, nor anything sinister and threatening, except that they have a tendency to "threaten" to give him due process in a court of law. We contend they are legitimate, not compulsive, means of attempting to elicit a confession.

The right to silence in the face of an accusation and appeals to a suspect's conscience raise important questions, not about one's *legal* duty to confess or to admit guilt — that question is settled — but about values and obligations which tend to compromise the interests which a guilty person has in avoiding conviction and punishment. It is clear that a citizen who is part of a community and of a moral order which enjoys and exalts the rights described in *Miranda* knows that he has done something seriously wrong when he violates the fundamental rules or laws of that society.[12] And most concede the virtue inherent in owning up to the responsibility for one's actions, despite the likelihood of unpleasant consequences. A rational theory of Fifth Amendment jurisprudence should acknowledge that this sense of right and wrong is an essential animating factor in everyone's life, and is not a "fetter" upon the exercise of free will.

This is not a simple question, but the closest *Miranda* comes to addressing it is at 384 US, at 468 n. 37 and text, wherein the Court suggests that it is only the "subnormal and woefully ignorant," and perhaps those just a cut above, who believe that silence in the face of an accusation is damning and that it may be a good thing to answer the questions put to them by a policeman. A reasonable inference to be drawn from this suggestion is that defiance of lawfully constituted authority by the unquestionably guilty is not merely permissible under the compulsory self-incrimination clause, but is something that one should engage in without any feelings of guilt, shame, or ambivalence. *Miranda* thus implies that there is no room in the Constitution for the beliefs that decent and honorable people do not take the Fifth, and that acceptance of responsibility for crime is fully compatible with human dignity.

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[12] See Bernick, *Of Crime and Conscience*, 68 A.B.A. Jour. 306 (1982).

Miranda fails as well to address the value which society places upon confessions by the guilty.[13] Although the Court called them a "proper element" in law enforcement, 384 US, at 478, it did not indicate that they were valuable and desirable items of evidence. (There is a marked tone of hostility toward confessions in *Escobedo* v *Illinois*, 378 US 478 (1964), which the Court in *Miranda* re-examined and reaffirmed.) Many serious crimes, such as the one involved in this case, cannot be solved or proved beyond a reasonable doubt without them. Beyond that, it is reassuring to society at large to know that its system of criminal justice is operating effectively to separate the innocent from the guilty, and confessions surely contribute to that result. And the community, broadly defined, may well regard an admission that one has violated its fundamental laws and is willing to accept the lawfully imposed consequences of his actions as an essential first step toward rejoining that community in an abstract sense, and toward improving oneself (in a way that affects the community) in a more concrete sense.

The Court in *Miranda* created a Fifth Amendment right to counsel during custodial interrogation, ruling that the questioning of a suspect in custody bore a sufficient resemblance to a phase of the adversary process to justify the formulation of a procedural safeguard or prophylactic

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[13] It seems to be generally recognized that the law of confessions deals only with confessions by the guilty defendant, and with the question of whether it is somehow unfair to effectively resolve the issue of his guilt before the trial even begins, depriving him of a "sporting chance" to gain an acquittal. *Frey, supra*, n. 10, at 733-734. It is generally acknowledged that all the institutions involved in the criminal justice process have a vested interest and a clear legal duty to protect the innocent, over and above the personal proclivities of all or most of the individual members of those institutions to achieve the same result. If the system is not infallible in doing this, it is generally not because of a Fifth Amendment problem.

rule[14] to protect the privilege, and there is no denying the legitimacy of the concerns with police brutality and intimidation which underlay *Miranda's* substantial revision of the law of confessions. Yet it left unsettled the basic questions which it raised by elevating the privilege against compulsory self-incrimination in the scheme of criminal procedure.[15] *Miranda* created elaborate safeguards whch serve to protect a defendant from his own unwise or improvident disclosures, and in the process failed to acknowledge the importance of confessions and the legitimacy of reasonable police procedures directed toward obtaining them. The result is a system which focuses exclusively upon fine questions of when a subject is being interrogated and when he has waived his rights, and "protects" him in situations which bear no resemblance whatever to the identified problem.

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[14] *Michigan* v *Tucker*, 417 US 433 (1974); *Brown* v *Illinois*, 422 US 590 (1975). The question presented by this case could be framed as an exclusionary rule issue, which we have developed in Issue III of this petition. If there is a middle ground wherein this case might fall, between confessions which are compelled within the meaning of the Fifth Amendment and those which were obtained through a violation only of the rules established to protect the right, *Wainright* v *Sykes*, 433 US 72, 87 n. 11 (1977), then good faith violation of the rules might be forgiven under some circumstances. This would be so because the exlusion of the evidence would not be required directly by the Constitution, because probative evidence is of obvious importance to the truth seeking process, and because the exclusionary rule can have little or no effect upon inadvertent or good-faith conduct. The *Miranda* rules would be largely obeyed in any event, both because it is widely believed to be proper to obey the law as stated by this Court (despite grudging acceptance upon occasion) and because obedience to those rules will always be a central consideration in the inadmissibility of any confession.

Despite the plausibility of this approach, the Court appears to have been unwilling to apply it in the Fifth Amendment context, preferring instead to treat those confessions obtained only in violation of *Miranda* as if they were compelled or coerced even when they were not, in order to maintain the structural integrity of a system of interrogation law which has its foundation in the compulsory self-incrimination clause, and to avoid issuing what might be understood by some as an invitation to violate the Court's rules.

[15] The court in *Miranda* characterized the privilege against self-incrimination as "the essential mainstay of our adversary

If we are granted all the relief we are asking for, the judgment below would be reviewed under principles which focus upon whether a confession has been compelled or coerced, and which acknowledge the legitimacy of some means of attempting to elicit confessions. If no compulsive or coercive pressures are employed — the first principle of the system we are suggesting — then no question of the waiver of a right would arise. There would be no question that force, threats of force, the "third degree," and any form of "physically or psychologically exhausting interrogation that is so unpleasant that its subject is likely to confess just to put an end to it"[16] would amount to compulsion per se. The suspect in custody would be told that he has a right not to give a statement and that any statement he makes may be used against him, but he also would be told that his refusal or inability to explain the evidence against him will be taken into account to some degree. The presentation to a suspect of the evidence against him would be allowed, as would some appeal to his sense of right and wrong. The police also may state or imply that it may be beneficial to the suspect to cooperate with them. If the suspect is reluctant to say anything, some degree of persuasion or coaxing would be allowed, but the admissibility of the confession would then be tested under the *Johnson* v *Zerbst* waiver standard. Although the suspect may or may not be told of his right to counsel, court-appointed or retained, at some stage of the adversary system and under some other circumstances, these standards would recognize an interview with a suspect in custody to be an essential and legitimate stage of the investigative process, at which an attorney has no valid role.

system." 384 US at 460. This was in marked contrast to an observation which the court had made only twenty-nine years earlier in *Palko* v *Connecticut*, 302 US 319, 325-26 (1937). In *Miranda*, because the procedural safeguards which the court prescribed to protect the right were not adhered to in the cases before it, the Court overruled its decisions of eight years earlier in *Crooker* v *California*, 357 US 433 (1958), and *Cicenia* v *Legay*, 357 US 504 (1958). 384 US, at 479 n. 48.

[16] *Frey, supra* n. 10 at 735.

In this case, Captain Ritenour's treatment of Respondent seems generally to have been decent and humane. No force or threats were used, and he was subjected to no lengthly periods of interrogation. In essence, Ritenour presented Respondent with the evidence against him and asked if he cared to give his version of events. There are other complicating factors, apparent in the statement of the case, which would bear upon the admissibility of this confession, but we contend that they did not amount to compulsion. Ritenour obviously had every intention of obtaining Respondent's side of the story for use as evidence against him. He behaved like a detective trying to get a conviction, and he succeeded. We believe that his efforts, and those of other law enforcement officers in similar situations, have not been judged by a standard which properly values this accomplishment, and it is for that reason we are asking the Court to reverse the judgment of the court below.

II

The Michigan Supreme Court held that this Court's decision in *Edwards* v *Arizona, supra,* was applicable to this case. Petitioner contends that this holding is incorrect, contrary to both this Court's opinion in *Edwards* and to the well established doctrine that judicially-created rules of procedure which implement constitutional rights may be given prospective effect only. *Johnson* v *New Jersey,* 384 US 719; *Linkletter* v *Walker,* 381 US 618 (1965); *Tehan* v *United States ex rel Shott,* 382 US 406 (1966). Petitioner further contends that this Court's holding in *Edwards* should be given prospective effect only.

In determining whether a judicially-fashioned rule of procedure should be given either prospective or retroactive effect, the decision does not turn upon the

specific Constitutional provision from which the judicial rule is derived. Rather, the decision to give retroactive or prospective effect to a rule of criminal procedure depends upon an analysis of the function, historical antecedents, and impact on the criminal justice system of that specific rule of criminal procedure. *Johnson* v *New Jersey, supra*, at 1778.

The test to be employed in deciding whether a constitutional rule of criminal procedure should be given retroactive versus prospective effect consists of an anlysis of three criteria: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stoval* v *Dennis*, 388 US 293, 297 (1967).

The new standards of criminal procedure in *Edwards* v *Arizona, supra*, may be stated as follows: a suspect may not be interrogated once a request for counsel has been made until counsel has been made available to him unless the defendant initiates the subsequent communication with the police.

The first criterion of the prospective versus retroactive application test mandates a determination that the rule of *Edwards* v *Arizona, supra*, should be given prospective effect only. The function of the *Edwards* v *Arizona* rule is not to protect the integrity of the fact-finding process by excluding evidence of questionable relevance, reliability, or materiality. See, *Johnson* v *New Jersey, supra*, at 1779. The *Edwards* rule serves instead to inform the police of the standards of conduct which they must follow once a suspect requests counsel under *Miranda*. The *Edwards* rule resolves the ambiguity as to what type of police conduct is acceptable once a defendant invokes his right to counsel under *Miranda*. Under both *Miranda* and *Michigan* v *Mosley*, 423 US 96 (1975), the question of how a defendant could waive a previously stated desire to

have the benefit of counsel before custodial interrogation continued went unanswered. Indeed, given the decision by this Court in *Michigan* v *Mosely, supra*, that a defendant could rescind a previous decision to remain silent and to not respond to custodial interrogation, and that a statement made following a subsequent advice of rights and voluntary waiver was admissible at trial, it is evident that police authorities had every reason to believe that a defendant could, upon a subsequent advice of rights and a voluntary waiver of the right to have counsel present, make a voluntary statement that would be admissible at trial[17]. Since the question of acceptable police conduct in the *Edwards*-type situation was left open, the *Edwards* rule should be accorded prospective effect only.

An analysis of the second criterion also mandates a determination that the *Edwards* rule should be given prospective effect only. The fact that law enforcement authorities relied on the old standard that a voluntary recission of a previously-stated desire to remain silent and consult with an attorney is seen most graphically by the number of cases cited by this Court in which various Courts of Appeals have previously held that a valid waiver of the Fifth Amendment right to counsel is acceptable. *Edwards* v *Arizona*, 101 S Ct at fn 9. In addition, numerous state court decisions have held that a

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[17] The fact that police conduct nearly identical to the conduct in this case was held to be acceptable with respect to a defendant's decision to rescind a prior decision to remain silent understandably led police authorities and courts to believe that a defendant could similarly waive a decision to obtain counsel. Since the police authorities were not foreclosed from the conduct occurring in this case, this Court should not retroactively apply a more stringent standard of conduct. Petitioner hereby advocates the position of the Petitioner in *United States* v *Johnson* , 626 F2d 753 (CA, 1981) *certiorari granted*, 102 S Ct 89 (1981)

valid waiver of the Fifth Amendment right to counsel is proper, relying on this Court's previous decision in *Michigan* v *Mosley, supra*, that a valid waiver of a previously stated desire to remain silent and not give a statement could result in a statement admissible at trial. As amply evidenced by the large number of cases in which this issue has surfaced, there was widespread reliance on the belief that, prior to this Court's decision in *Edwards* v *Arizona, supra*, a defendant who had asserted the Fifth Amendment right to counsel could indeed rescind that decision, and give a voluntary statement which could be admitted at trial.

The third criterion for determining prospective versus retroactive application of the *Edwards* v *Arizona* rule is the effect of that rule on the administration of justice. There are two aspects to this criterion. First, it must be determined whether the evidence which had been admitted in trials prior to the establishment of the *Edwards* rule was untrustworthy, whether it had the propensity to lead to the conviction of the innocent. The evidence in question is statements, taken in conformity with the requirements of *Miranda* v *Arizona, supra*, and admitted at trial. These statements, in order to comply, must have been shown to have been made after the defendant voluntarily and knowingly waived his right to have counsel present. The test of a voluntary and knowing waiver of the defendant's *Miranda* rights having been met, there can be no contention that retrospective application of the *Edwards* rule is required[18]. The second aspect of this third criterion is

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[18] This Court in *Johnson* v *New Jersey, supra*, held that the dictates of *Miranda* should not be retroactively applied. Petitioner contends that if *Miranda* warnings were given, as in this case, and a knowing and voluntary waiver was subsequently made, there can exist no compelling reason to retroactively apply the *Edwards* rule designed to ensure *Miranda* compliance when the complex of rights accorded by *Miranda* were not given retroactive application.

whether retrospective application of the *Edwards* v *Arizona* rule would unduly burden the administration of the criminal justice system. A retroactive application of the *Edwards* v *Arizona* rule would require the reprosecution or release of numerous state and federal defendants who were previously found guilty by trustworthy evidence[19].

Under all three criteria, the procedural rule for interrogation of prisoners announced in *Edwards* v *Arizona, supra*, should not be given retrospective application. Petitioner contends that the *Edwards* rule should be effective only prospectively from the date of the opinion, and should not apply to cases such as the instant case, which were not "final" at the date of the *Edwards* opinion, based upon the authority of *Johnson* v *New Jersey, supra*. Petitioner contends that the procedural rule of *Edwards* v *Arizona*, should apply to cases tried after May 18, 1981, the date of its decision. Since the trial of respondent herein occurred on April 1, 1977, the procedural rule of *Edwards* should have no application to this case, and the judgment of the Michigan Supreme Court to the contrary should be reversed.

III

Petitioner further contends that this case presents an issue suitable for development and application of a balancing test rule to cases such as this in which a good-faith, inadvertent violation of a previously

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[19] The release of even one convicted criminal because of stale or unavailable evidence is too great a price to pay for whatever miniscule effect on propective police authorities' conduct would result from a prospective application of the rule of criminal procedure explicated in *Edwards* v *Arizona, supra*. Cf. *Stone* v *Powell*, 428 US 465 (1976).

unexplicated constitutional rule of criminal procedure should not result in exclusion of the evidence obtained in inadvertent violation of criminal procedure rules designed to safeguard the rights of the Fifth Amendment.

Petitioner recognizes that, thus far, this Court has been unwilling to apply a balancing test in the context of statements obtained in violation of *Miranda*. However, the treatment of all violations of the changing requirements arising out of the *Miranda* decision as equal in force and scope occasions gross distortions of the criminal justice system.

This case presents an excellent example of that distortion which obtains when every violation of the elaborate rules constructed to ensure compliance with the Fifth Amendment in interrogation law is treated as though the confession thus obtained was involuntary. Respondent was a man well-versed in the criminal justice system, and is a man who was well aware of the right to remain silent and right to obtain an attorney. According to his own testimony, he had more than fifty (50) previous contacts with the criminal justice system. Also, according to the testimony of the police authorities who obtained the statement from respondent, respondent stated to them that he knew his rights, he knew he could have an attorney, but that he wanted to give a statement. Absolutely no coercive tactic and no abuse of any sort was utilized by police authorities to cause him to give a statement to the police. Under these facts, the statement by Respondent was given voluntarily, freely, and with complete understanding of his position and his right to have counsel.

The suppression of Respondent's confession in this case does nothing to further any possible goal of either *Edwards* v *Arizona, supra* or *Miranda* v *Arizona, supra*. Likewise, this decision by the Michigan Supreme Court does nothing to safeguard any constitutional right of

Respondent. All that his decision does is overturn his conviction by treating this inadvertent and good faith violation of a judicially-created rule of criminal procedure established solely to provide additional substance to *Miranda* safeguards which were honored by police authorities under then existing judicial guidelines permitting a resumption of interrogation after a sufficient time lapse. *Michigan* v *Mosely, supra*, cf *Edwards* v *Arizona, supra* at fn. 1 (Opinion of Powell, J).

Rather than treating each violation of the criminal procedure rules created around the *Miranda* rights as requiring the suppression of the confession obtained, this Court should fashion a balancing test designed to safeguard the rights of both defendants and society as a whole by determing whether, under the facts of the specific case, suppression of a confession is warranted or unadvised.

In creating a balancing test to safeguard the interests of society in preserving Fifth Amendment rights inviolate as against preserving reliable evidence for a criminal trial, assuring the finality of criminal proceedings, and providing police authorities with some measure of reliance on whatever rule of criminal procedure may be in existence at a given time, Petitioner contends that the following factors should be included:

1. The nature of the rule violated;
2. The good or bad faith nature of the action taken;
3. The trustworthiness or reliability of the statement obtained.

These factors would, necessarily, coalesce to a significant degree.

For example, the violation of a defendant's right to have interrogation performed with engaged counsel present, if shown, would also indicate bad faith on the part of the police authorities.

On the other hand, the "violation" involved in this case is not one of a substantial, known right, but rather is a rule of procedure only. The "violation" is one of pure inadvertence; the police authorities could not have known that the *Edwards* rule would be constructed five (5) years after their actions. Since the violation was inadvertent, the police authorities' good faith is established; the authorities could not act in bad faith of the *Edwards* rule against initiating subsequent contact since the rule did not exist when the violation occurred. Finally, the trustworthiness of the statement obtained in this case cannot be disputed; no coercion was used; and under *Miranda* standards the Respondent was fully, fairly, and completely advised of his rights, and made a knowing and voluntary admission of guilt.

If this Court were to construct a balancing test approach to consideration of interrogation law violation, the clear result of a review of the "violation" in this case would be to permit the introduction of the statement taken from Respondent. In balancing the rights of defendants to be secure from violations of the Fifth Amendment as against society's interest, outlined above, the clear result would be to allow the Respondent's statement to be admitted at trial. Petitioner urges this Court to adopt this rule; continued application of the suppression of statements, no matter how slight the interrogation law violation, is too great a price to pay for the limited, marginal benefits obtained. Cf. *Stone* v *Powell*, 428 US 465 (1976).

RELIEF REQUESTED

WHEREFORE, Petitioner prays that this Honorable Court grant this Writ of Certiorari and reverse the judgment of the Supreme Court of Michigan.

Respectfully submitted,

L. BROOKS PATTERSON,
PROSECUTING ATTORNEY
OAKLAND COUNTY, MICHIGAN.

Appendix

APPENDIX

OPINION OF THE MICHIGAN SUPREME COURT

(State of Michigan — Supreme Court)

(Filed Feb. 1, 1982)

(People v Paintman; People v Conklin)

Docket Nos. 63894, 62908. Argued March 3, 1981 (Calendar Nos. 4, 5) — Decided February 1, 1982.

Norman Paintman was convicted by a jury in Oakland Circuit Court, William John Beer, J., of first-degree murder. The trial court had granted the defendant's pretrial motion to suppress a statement he gave to the police, three days after his arrest and after he twice unsuccessfully asserted his right to counsel, on the ground that it was involuntary; however, the Court of Appeals, in an interlocutory appeal by the prosecuting attorney, reversed the order to suppress and the statement was introduced in evidence. The Court of Appeals, Danhof, C.J., and V. J. Brennan and Carroll, JJ., affirmed the defendant's conviction on the ground that its interlocutory order controlled the admissibility of the statement (Docket No. 77-3436). The defendant appeals.

Raymond Conklin, Jr., was convicted by a jury in Monroe Circuit Court, James J. Kelley, Jr., J., of armed robbery. The trial court denied the defendant's pretrial motion to suppress a confession he gave sheriff's officer nine days after his arrest and initial request for the assistance of counsel and seven days after his arraignment, although the officers knew that defendant was represented by counsel at the time he confessed but did not contact the attorney. The Court of Appeals, R. B.

Burns, P.J., and D. F. Walsh and Clements, JJ., affirmed in an unpublished per curiam opinion (Docket No. 77-688). The defendant appeals.

In a unanimous opinion by Justice Fitzgerald, the Supreme Court *held:*

The defendants' convictions are reversed and remanded for new trials, at which the statements made without the requested assistance of counsel may not be admitted.

1. The Supreme Court of the United States has emphasized the importance of the right to counsel during custodial interrogation. Although the accused may waive such rights, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel. An accused who has expressed the desire to invoke the right to counsel is not subject to further interrogation by the police until counsel has been made available, unless the accused himself initiates further communication, exchanges, or conversations with the police.

2. Waivers of counsel must not only be voluntary, but must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege. The two questions are discrete inquiries, and a valid waiver cannot be established merely by showing that an accused who has asked for an attorney responded to further custodial interrogation initiated by the police even after he has been advised of his rights. The lawyer is the protector of the rights of the accused in his dealings with the police and courts. Therefore, the Supreme Court of the United States has fashioned the rigid rule that an accused's request for an attorney is

per se an invocation of his Fifth Amendment rights, requiring all interrogation to cease.

3. In these cases, the defendants requested counsel when they were questioned by the police after their arrests. They again asked for attorneys when they were arraigned. A tape-recorded statement by an alleged accomplice was played for Paintman before he confessed, and Conklin was placed in a room with his younger alleged accomplice before his statement; he had discussed with the sheriff's officers the possibility of leniency for the accomplice. Paintman was a heroin addict who suffered withdrawal symptoms in the days preceding his statement. He was the target of derisive comments from inmates and employees of the jail because one of the victims was a young child, and there was testimony about his suicidal mood. He also told employees of the jail that he did not wish to talk to the police. Conklin was placed in a line-up the day after his arrest and spent most of his time in solitary confinement following his request for an attorney until after he confessed.

4. The Fifth and Fourteenth Amendment require a clear demonstration of waiver of the right to counsel. Such clarity is not apparent when an accused's request for counsel is met by silence or inaction for a matter of days, or when the request is followed by a move to solitary confinement. No matter what the reason, the facts of these cases do not fulfill the spirit or comport with the policies of the decisions of the Supreme Court of the United States. Neither Paintman nor Conklin initiated the conversations from which their inculpatory remarks emerged. The statements came after the defendants expressly requested counsel and were

subjected to custodial interrogation. It is inconsistent with the case law for the police to instigate interrogation of an accused in custody who has clearly asserted the right to counsel. The sheriff's officers were aware that counsel had been appointed to represent Conklin and had filed an appearance. Paintman had expressed his desire to speak with an attorney in response to a question by the chief assistant prosecutor, who then left, but the police continued to talk with the defendant. The use of the confessions against the defendants at trial violated their rights under the Fifth and Fourteenth Amendments; therefore, the convictions are reversed and the cases are remanded for new trials.

Reversed and remanded.

92 Mich App 412; 285 NW2d 206 (1979) reversed.

OPINION

(State of Michigan Supreme Court)

(Filed Feb. 1, 1982)

People of the State of Michigan, Plaintiff-Appellee, v Norman Paintman, Defendant-Appellant. No. 63894; People of the State of Michigan, Plaintiff-Appellee, v Raymond Henry Conklin, Jr., Defendant-Appellant. No. 62908.

BEFORE THE ENTIRE BENCH

FITZGERALD, J.

We are asked in these two cases to consider the admissibility of a statement made by an accused in police custody who had asked for an attorney. Each defendant had requested counsel at least twice after

being arrested and advised of his *Miranda*[1] rights, and each later made inculpatory statements without having conferred with an attorney.[2]

We reverse the convictions and remand for new trials, at which the statements may not be admitted.

I

Defendant Paintman was sentenced to mandatory concurrent terms of life imprisonment after a jury convicted him of four couts of first-degree murder.[3] The case involved the fatal shootings of three adults and a child at an apartment in Southfield.

Prior to trial, defendant moved to suppress a statement he allegedly[4] gave police on March 1, 1976, three days after his arrest. The trial court ruled, following a *Walker*[5] hearing, that the statement should be excluded because it was involuntary. The Court of Appeals reversed, stating, "[W]e are left with a definite and firm conviction that the statements of defendant-appellee of March 1, 1976 were voluntarily given and may be admitted at trial." The Court cited *People* v *McGillen* #1, 392 Mich 251; 220 NW2d 677 (1974). Defendant's motion for rehearing was granted, but the Court of Appeals affirmed its prior order. This Court denied defendant's application for leave to appeal the interlocutory order.[6]

Following his convictions, Paintman appealed as of right to the Court of Appeals, which affirmed. The Court refused to consider the admissibility of the statement, saying that the question had been addressed in the interlocutory appeal and that that ruling "is the law of the case and is controlling."[7] This Court granted leave to appeal.[8]

Defendant Conklin was sentenced to life in prison after a jury convicted him of the armed robbery[9] of a gasoline station in Monroe. Prior to trial, a *Walker*[10] hearing was held in response to defendant's motion to suppress a confession he gave sheriff's officers on July 22, 1976, nine days after his arrest.

The trial court denied defendant's motion, holding that the statement had been made voluntarily and in compliance with *Miranda*. The confession subsequently was admitted at trial. The Court of Appeals affirmed defendant's conviction in an unpublished per curiam opinion. Rehearing was denied. This Court granted defendant's delayed application for leave to appeal.[11]

II

The basic rights to be afforded an accused in police custody were spelled out by the United States Supreme Court in *Miranda* v *Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). These rights were further refined in subsequent opinions.[12] The most recent explication of *Miranda* and its progeny is *Edwards* v *Arizona*, — US —; 101 S Ct 1880; 68 L Ed 2d 378 (1981). In *Edwards*, the Court re-emphasized the importance of the right to counsel during custodial interrogation.

Edwards was arrested on charges of murder, robbery and burglary, and was taken to the police station and advised of his *Miranda* rights. After the defendant indicated that he understood his rights and was willing to submit to questioning, he was told he had been implicated by another suspect. The defendant denied involvement, presented an alibi and sought to make a "deal." He subsequently said he wanted to talk with an attorney and questioning ceased. However, police

detectives appeared at the county jail the next day to see Edwards. Defendant said that he didn't want to talk with the officers, but was told by a jail guard that "he had" to do so.

After the detectives advised Edwards of his *Miranda* rights, defendant indicated that he was willing to talk if he first could hear the tape-recorded statement of his alleged accomplice. After listening to the statement for a few minutes, defendant said he would talk as long as his own remarks were not taped. Edwards thereafter implicated himself.

The Arizona Supreme Court said that Edwards had invoked his right to remain silent and his right to counsel, but subsequently had waived both. The court concluded that the confession and waiver were voluntarily and knowingly made.

The United States Supreme Court reversed, holding that the use of the confession at trial violated Edwards' rights under the Fifth and Fourteenth Amendments. The Court noted that although it had held in previous cases that an accused may waive *Miranda* rights, "the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel * * *." *Edwards*, p —. The Court then set down the rule governing the waiver of the right to counsel once it has been invoked:

> "[A]n accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel *has been made available* to him, *unless the accused himself initiates* further communication, exchanges or conversations with the police." *Id.* (Emphasis added.)

The Court said that the Arizona courts had applied an erroneous standard in determining whether there had been a valid waiver. "[W]aivers of counsel must not only be voluntary, but constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Id.*, p —. The question of "voluntariness of a consent or an admission on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries," the Court said. *Id.*, p —.

A valid waiver cannot be established merely by showing that an accused who has asked for an attorney "responded to further *police-initiated custodial interrogation* even if he has been advised of his rights," the Court said. (Emphasis added.)

We hold that *Edwards* is controlling in the cases at bar and mandates reversal of the convictions.

III

The facts of *Paintman* and *Conklin* are strikingly similar to the facts of *Edwards* and even more dramatic.

Edwards requested counsel when questioned by police following his arrest, as did Paintman and Conklin. However, the latter two defendants again asked for attorneys when arraigned; Edwards' confession apparently preceded his arraignment. Paintman's statement came three days after he twice asserted his right to counsel. Conklin's statement came nine days after his arrest and initial request for counsel, and seven days after his arraignment. In addition, officers were aware at the time Conklin confessed that he was represented by counsel, but did not contact the attorney. "I'm not required to" was the deputy sheriff's response when asked about the failure to alert counsel.

Alleged accomplices were involved in both *Paintman* and *Conklin*, as was the situation in Edwards. Taped statements by the accomplices were played to both Edwards and Paintman prior to their confessions. In *Conklin*, defendant was placed in a room with his younger alleged accomplice to "clear things up" just prior to defendant's statement. There was testimony that before confessing, Conklin had discussed with officers the possibility of leniency for the accomplice.

The Supreme Court has recognized the inherent pressures on an accused undergoing custodial interrogation and the critical role that counsel plays in guarding against erosion of Fifth Amemdnent rights.

> "Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." *Fare* v *Michael C*, 442 US 707, 719; 99 S Ct 2560; 61 L Ed 2d 197 (1979).

The pressure on Edwards seemingly was of less intensity and of shorter duration than that on Paintman and Conklin.

Paintman was an admitted heroin addict with a $60 to $80 daily habit. He suffered withdrawal symptoms in the days preceding his statement. He was the target of derisive comments such as "baby killer" from both inmates and jail personnel because one of his alleged victims was a young child. There also was testimony about Paintman's suicidal mood. Further, as was the case

in *Edwards*, Paintman told jail personnel prior to making his statement that he didn't wish to talk with police. That desire was answered by detectives appearing at the jail later in the day.

Conklin was placed in a line-up the day after his arrest and spent most of his time in solitary confinement following his request for an attorney. He was taken out of the maximum security area after he confessed. There was testimony that the transfers were administrative in nature and unrelated to his initial refusal to talk with officers or his subsequent confession.

The *Edwards* Court did not hold that once an accused has asked for counsel the right cannot be abandoned without an attorney first being involved, nor do we. What we do hold is that the Fifth and Fourteenth Amendments require a clear demonstration of waiver. Such clarity is not apparent when an accused's request for counsel is met by silence or inaction for a matter of days. Nor does it exist when a defendant's request is followed by a move to solitary confinement, no matter what the reason for the transfer.

The facts adduced at the trials of these two cases do not fulfill the spirit of *Miranda* nor comport with the policies articulated in *Edwards*.

Neither Paintman nor Conklin *initiated* the conversations from which their inculpatory remarks emerged. The statements came after defendants expressly requested counsel when confronted by officers and questioned. There is no doubt that both Paintman and Conklin were subjected to custodial interrogation within the meaning of *Miranda*. Were that not the case, there would be no need to reach the question of waiver.[13]

"By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 444.

Paintman specifically had informed police officers prior to their arrival at the jail that he didn't wish to talk. Nonetheless, officers had him brought to an interview room. Conklin was taken out of solitary confinement and placed in a room with his younger alleged accomplice prior to his statement.

The United States Supreme Court has recognized that custodial interrogation by police may take different forms: "We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island* v *Innis*, 446 US 291, 300, 301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

The *Edwards* Court emphasized, and we hold, that it is inconsistent with *Miranda* and its progeny for authorities to instigate a reinterrogation of an accused in custody who has clearly asserted the right to counsel. There is little doubt that both Paintman and Conklin clearly asserted their rights to counsel. In fact, their resistance to questioning continued unabated for a period of days.

In Conklin's case, authorities were not only aware that he had requested counsel, but that counsel had been appointed and had filed an appearance. In Paintman's case, he first indicated his desire to speak with an attorney in response to a direct question by the chief assistant prosecutor.[14] The prosecutor then left, but police continued to talk with defendant.

Of what significance is invocation of a cherished constitutional right if it is ignored by the hearer and, in

fact, only seems to exacerbate the defendant's plight? As the time gap increases between the embracing of the right and its fulfillment, the certainty of its existence must surely dim.

Miranda becomes meaningless rhetoric in the face of a request for counsel that matures only in form but not in substance.

> "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda*, 476.

IV

The *Edwards* Court took pains to establish that it was not announcing new law, but only clarifying further the dictates of existing law.

> "Because the use of Edwards' confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments *as construed* in *Miranda* v *Arizona, supra*, we reverse the judgment * * *." (Emphasis added.) *Edwards*, ——.

The Court later recited a parade of cases that supported the proposition of *Miranda* that "the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present' "

The Court concluded the discussion by noting that "[w]e reconfirm these views and to lend them substance, emphasize that it is inconsistent with *Miranda* and its

progeny for the authorities, at their instance [*sic*], to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.*, ——.

Thus, it is unnecessary to analyze the question of retroactivity under traditional standards.

In view of our decision to reverse the defendants' convictions and remand these cases for new trials, we do not decide the other issues raised.

Reversed and remanded.

/s/ John W. Fitzgerald
/s/ James L. Ryan
/s/ Mary S. Coleman
/s/ Blair Moody, Jr.
/s/ Charles L. Levin
/s/ Thomas Giles Kavanagh
/s/ G. Mennen Williams

Footnotes for Opinion

[1] *Miranda* v *Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] The record of the *Walker* hearing (fn 5, *infra)* in the case of defendant Conklin contains an ambiguous reference to a conversation between defendant and an attorney. Defendant was asked by his attorney whether "your attorney ever advised you with regard to the giving of any statements?" Defendant replied, "Yes, he told me not to give any." It is unclear as to where, when and by whom that advice was offered.

[4] A police lieutenant prepared the statement from memory following the conversation with defendant Paintman. Defendant disputed its contents.

[5] *People* v *Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[6] 397 Mich 885 (1976). Chief Justice Thomas G. Kavanagh and Justice Levin would have granted leave to appeal.

[7] *People* v *Paintman*, 92 Mich App 412; 416; 285 NW2d 206 (1979).

[8] *People* v *Paintman*, 408 Mich 896 (1980).

[9] MCL 750.529; MSA 28.797.

[10] See fn. 5.

[11] *People* v *Conklin*, 408 Mich 958 (1980).

[12] See, for example, *Rhode Island* v *Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *Fare* v *Michael C*, 442 US 707; 99 S Ct 2560; 61 L Ed 2d 197 (1979); *North Carolina* v *Butler*, 441 US 369; 99 S Ct 1755; 60 L Ed 2d 286 (1979); *Michigan* v *Mosley*, 423 US 96; 96 S Ct 321; 46 L Ed 2d 313 (1975).

[13] *Rhode Island* v *Innis*, 446 US 291; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

[14] A tape-recorded statement by Paintman's alleged accomplice was played for defendant in the prosecutor's office. During a break in the playing, defendant was asked if he wished to speak with an attorney. "Certainly I want to talk to a lawyer," defendant replied.

OPINION OF THE MICHIGAN COURT OF APPEALS

(State of Michigan Court of Appeals)

(Filed Sept. 19, 1979)

(People v. Paintman)

Frank J. Kelly, Attorney General, Robert A. Derengoski, Solicitor General, L. Brooks Patterson, Prosecuting Attorney, Robert C. Williams, Chief Appellate Counsel, and Lawrence J. Bunting, Assistant Prosecuting Attorney, for the people.

P. E. Bennett, Assistant State Appellate Defender, for defendant on appeal.

Before: Danhof, C. J., and V. J. Brennan and H. R. Carroll,* JJ.

V. J. Brennan, J. Defendant, Norman Paintman, was convicted by a jury of four counts of first-degree murder, MCL 750.316; MSA 28.548. Defendant was sentenced to life inprisonment on each conviction and brings this appeal by right.

The defendant and one William Wardel Kidd were charged together with the February 23, 1976, premeditated murders of Ronald Brown, Floyd McElahanon, Theodoro Nelson, and Andrea Brown. At trial the medical examiner testified that the victims died of gunshot wounds to the head. One to three wounds were inflicted on each victim; seven wounds in all. Police officers established by their testimony that the four victims had been discovered lying side-by-side on

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* Former circuit judge, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

the floor of a Southfield apartment on February 23, 1976. Testimony relating to bullets and shell casings established the probable weapons as a Smith and Wesson revolver and an F.I.E "Titan Tiger".

The prosecution's evidence also included testimony by Arthur Sailes. Sailes was an ex-narcotics dealer who had frequently purchased narcotics from Floyd McElahanon. Sailes testified that he drove to McElahanon's apartment in Southfield on February 23, 1976, after speaking with McElahanon on the telephone at about noon that day. Arriving in the area of the apartment at approximately 12:25 pm, Sailes saw the defendant and Kidd leave McElahanon's apartment building. The defendant was carrying a shiny object in his hand. Sailes tried to gain entry into the apartment building by ringing the bell but received no response. He entered the building with a key and went to McElahanon's apartment, finding the door open. Sailes stated that, looking inside, he saw three bodies on the floor and noticed an odor of gunpowder. Sailes stated that he had known William Kidd for a period of time and he had seen Kidd carry a .38-caliber Smith and Wesson revolver. He testified that Kidd had threatened to kill Floyd McElahanon.

Also presented as a part of the prosecution's case was testimony from Southfield Police Captain Edward Ritenour. Ritenour related the substance of defendant's statement given on March 1, 1976, in the Oakland County jail. According to the statement, defendant agreed to go with William Kidd to McElahanon's apartment to hold up McElahanon for money and drugs. Defendant knew that Kidd also intended to kill McElahanon. Defendant also knew that Kidd owed McElahanon money for previous drug dealings. Defendant and Kidd went to McElahanon's apartment

building where Kidd gave defendant a handgun. Kidd and defendant then gained entrance to the apartment building, and ultimately into McElahanon's apartment where they forced the people inside to lie on the floor. Kidd "covered" the people on the floor while defendant searched for, and found, a quantity of drugs and money. Then defendant and Kidd shot the persons lying on the floor, and left.

The jury returned a verdict of guilty on all counts. Defendant appeals raising several allegations of error.

The first two allegations of error concern the admissibilty of defendant's statement made while in police custody. This precise question was addressed by this Court in a previous interlocutory appeal by the prosecutor. In that appeal the *Walker*[1] hearing in the present case was reviewed on the whole record with the ultimate finding that the statement was voluntary and thus admissible. *People v McGillen #1*, 392 Mich 251; 220 NW2d 677 (1974). Since the prior ruling concerned the same questions of law presented on this appeal, it is the law of the case and is controlling. A legal question which has been raised in one appeal may not be raised again in a subsequent appeal after proceedings held on remand to the lower court. *People v Drew*, 83 Mich App 57; 268 NW2d 284 (1978), *Allen v Michigan Bell Telephone Co*, 61 Mich App 62; 232 NW2d 302 (1975).

Next defendant argues that the trial court erred in instructing the jury that they could find the defendant guilty of aiding and abetting first-degree murder when the alleged principal had been convicted of second-degree murder. The defendant's contention is without

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

merit. A person may be prosecuted for aiding and abetting without regard to the conviction or acquittal of the principal. *People v Mann*, 395 Mich 472, 477-478; 236 NW2d 509 (1975), *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974).

Next defendant claims on appeal that the following instruction was erroneous:

> "It is charged in this case that Norman Paintman either deliberately committed the crime charged, that is either murder in the first degree, or that he intentionally aided and assisted another in the commission of the crime. All persons who aide [*sic*] or assist in the commission of a crime are as libel [*sic*] as if they had directly committed the crime and may be convicted of the principal offense or as an aider and abettor.
>
> "Before you may convict, you must be convinced of the following beyond a reasonable doubt: First, the crime charged must have been committed either by the Defendant or some other person; second, the Defendant must have peformed acts or given encouragement which aided or assisted the commission of that crime either before or at the time of the commission of the crime; third, the Defendant must have intended the commission of the crime charged at the time of giving aid or encouragement."

It is the defendant's contention that the rule of *People v Olsson*, 56 Mich App 500; 224 NW2d 691 (1974), requires reversal where a single offense is based on two alternative theories of guilt and the jury has not been instructed that it must unanimously agree on the theory upon which it finds the defendant's guilt. In *Olsson*, the

defendant was charged with murder in the first degree. The jury was instructed to agree unanimously on a verdict and was charged that a conviction of first-degree murder could follow from a theory of felony murder or from a theory of premeditated murder. In its explanation of the fault in the instruction in that case the Court noted:

> "We feel that these instructions did not adequately inform the jury of their duty to make a unanimous finding as to whether defendant was guilty of premeditated murder or murder in the perpetration of a felony. We agree with defendant that on the basis of these instructions, it is possible that the jury arrived at a compromise verdict, that is, some members of the jury may have felt defendant was guilty beyond a reasonable doubt of murder in the perpetration of a robbery or larceny while the remaining members may have felt that defendant was guilty beyond a reasonable doubt of premeditated murder. Such a verdict would not be unanimous and could not convict defendant. GCR 1963, 512.1." 56 Mich App 500, 506.

However, the determinative factor for the *Olsson* majority was a fatal lack of evidence on the underlying felony (robbery), and the Court held that no instruction on the felony murder theory was proper in the case, 56 Mich App 500, 504.

In three other cases this Court has held that where the evidence of felony murder and premeditated murder is sufficient to go to the jury, the failure to require the jury to unanimously decide between the theories is either not error or is harmless error. *People v Embree*, 70 Mich App

382; 246 NW2d (1976), *People v Embree*, 68 Mich App 40; 241 NW2d 753 (1976), *People v Fullwood*, 51 Mich App 476; 215 NW2d 594 (1974).

In *People v Burgess*, 67 Mich App 214; 240 NW2d 485 (1976), as in the case at bar, the guilt of the defendant rested on alternative theories of participating as principal or as aider and abettor. The evidence was sufficient to support guilt under either theory. The defendant admitted that the coactor was guilty as a principal but denied having any part in the assault. This Court found no error in jury instructions which did not require the jurors to unanimously decide whether the defendant was a principal or an aider and abettor.

Next the defendant argues that the trial court erred in admitting photographs of the victims of the shootings. We disagree.

The admission of photographs of the injuries suffered by the victims of crime is primarily committed to the discretion of the trial court. *People v Eddington*, 387 Mich 551; 198 NW2d 297 (1972). That case rejected the theory that the prosecution is bound to pursue alternative proofs before resorting to photographic evidence. In *People v Falkner*, 389 Mich 682, 685; 209 NW2d 193 (1973), the Court stated that the issue to be confronted in the admission of photographic evidence was whether the photographs were "substantially necessary or instructive to show material facts or conditions" or were merely "calculated to excite passion and prejudice".

In the case at bar the defendant addressed the jury before the opening of proofs, setting forth his claim that only Kidd had participated in the killings and that the defendant had not been present when the shooting occurred. The photographs were advanced by the prosecution as proof that all four victims were killed in a

matter of just seconds, supporting the inference that the fatal shots were fired by two gunmen. The prosecutor's closing argument asserted that the photographs showed that the victims had not attemped to rise from the floor or struggle while the shots were being fired. In this light we cannot say that the admission of the photographs constituted an abuse of discretion.

Contrary to the defendant's next assertion, we find nothing improper in the prosecutor's closing argument. The prosecutor did not inform the jury of the existence or outcome of the *Walker* hearing. With the validity and credibility of the defendant's confession under attack, claiming police fabrication, it was not unfair for the prosecution to show the facts and circumstances of the confession which would lend credibility to it. The jury was left with the ultimate task of deciding whether the statement was reliable.

The prosecutor's comment regarding the photographs was the subject below for a motion for mistrial. Review of the comment indicates that the prosecutor was using the photographs to advance a part of his case, specifically, that the shots were fired so quickly that two gunmen must have been involved. There is nothing in this argument that is improper.

Defendant next challenges the admission of testimony concerning threats made against a victim by William Kidd. The state of mind of William Kidd was relevant to his intent in killing the victims and therefore to the defendant's guilt as an aider and abettor. A declaration of an existing state of mind is admissible as an exception to the hearsay rule. *Hazen v Elmendorf*, 365 Mich 624; 113 NW2d 892 (1962). Under this exception availability of the declarant is irrelevant. See MRE 803(3).

As to the remaining allegations of error we find that the abbreviated reference by Captain Ritenour to the defendant's contemplation of suicide has not been shown to be sufficiently prejudicial to warrant a determination that the trial judge abused his discretion in denying defendant's motion for mistrial. In addition the district judge neither applied a faulty legal standard nor otherwise abused his discretion in binding the defendant over for trial on the charge of first-degree murder. Finally, the defendant's claim that the corpus delicti of first-degree murder had not been shown by competent evidence before his confession was introduced is without merit.

The defendant's conviction is affirmed.

JUDGE'S STATEMENT

(State of Michigan — Circuit Court — County of Oakland)

(April 1, 1977)

(People of the State of Michigan vs Norman A. Paintman, Defendant. No. CR76-27030 FY)

The above named respondent, Norman A. Paintman, was found guilty by a jury to the charge of Murder in the First Degree, Count I, Floyd McElhannon, and was on this date sentenced by this Court to the State Prison for Southern Michigan at Jackson, Michigan, for the rest of his natural life, and that during such time he be kept in solitary confinement and at hard labor.

A copy of the Probation Officer's report is attached hereto.

/s/ William John Beer, Circuit Judge

Dated: April 1, 1977

[*Certification omitted in printing*]

JUDGE'S STATEMENT

(State of Michigan — Circuit Court —
County of Oakland)

(April 1, 1977)

(People of the State of Michigan vs Norman A. Paintman, Defendant. No. CR76-27030 FY)

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A copy of the Probation Officer's report is attached hereto.

/s/ William John Beer, Circuit Judge

Dated: April 1, 1977

[*Certification omitted in printing*]

JUDGE'S STATEMENT

(State of Michigan — Circuit Court —
County of Oakland)

(April 1, 1977)

(People of the State of Michigan vs Norman A. Paintman, Defendant. No. CR76-27030 FY)

The above named respondent, Norman A. Paintman, was found guilty by a jury to the charge of Murder in

the First Degree, Count III, Theadro [*sic*] Nelson, and was on this date sentenced by this Court to the State Prison for Southern Michigan at Jackson, Michigan, for the rest of his natural life, and that during such time he be kept in solitary confinement and at hard labor.

A copy of the Probation Officer's report is attached hereto.

/s/ William John Beer, Circuit Judge

Dated: April 1, 1977

[*Certification omitted in printing*]

JUDGE'S STATEMENT

(State of Michigan — Circuit Court — County of Oakland)

(April 1, 1977)

(People of the State of Michigan vs Norman A. Paintman, Defendant. No. CR76-27030 FY)

The above named respondent, Norman A. Paintman, was found guilty by a jury to the charge of Murder in the First Degree, Count IV, Andrea Brown, and was on this date sentenced by this Court to the State Prison for Southern Michigan at Jackson, Michigan, for the rest of his natural life, and that during such time he be kept in solitary confinement and at hard labor.

A copy of the Probation Officer's report is attached hereto.

/s/ William John Beer, Circuit Judge

Dated: April 1, 1977

[*Certification omitted in printing*]

ORDER DENYING RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

(State of Michigan — Circuit Court — County of Oakland)

(Oct. 28, 1976)

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of October in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, Lawrence B. Lindemer, James L. Ryan, Associate Justices.

(People of the State of Michigan, Plaintiff-Appellee, v Norman Arthur Paintman, Defendant-Appellant. COA 29587 LC CR 76-27030 FY)

On order of the Court, the application by defendant-appellant for leave to appeal is considered, and the same is hereby DENIED, because appellant has failed to persuade this Court that the question presented should now be reviewed by this Court or that appellant will suffer substantial harm by awaiting final judgment before taking an appeal.

Defendant-appellant's motion for a stay of proceedings, and for immediate consideration thereof, are also considered and the same are hereby DENIED as moot.

T. G. Kavanagh, C.J., and Levin, J., would grant leave to appeal.

[*Certification omitted in printing*]

ORDER GRANTING RESPONDENT'S MOTION FOR REHEARING AND AFFIRMING ORDER REVERSING TRIAL COURT

(State of Michigan in the Court of Appeals)

(Aug. 26, 1976)

At A Session Of The Court Of Appeals Of The State Of Michigan, Held at the Court of Appeals in the City of Lansing, on the 26th day of August in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable Glenn S. Allen, Presiding Judge, Michael F. Cavanagh, Donald E. Holbrook, Jr., Judges.

(People of the State of Michigan, Plaintiff-Appellant, v Norman Paintman, Defendant-Appellee. No. 29587, L.C. # CR 76 27030 FY)

In this cause an application for rehearing having been filed by defendant-appellee, together with an answer to the application for leave to appeal, a motion to disqualify the panel and a motion for immediate consideration thereof, and an answer thereto having been filed by plaintiff-appellant, and due consideration thereof having been had by the Court;

IT IS ORDERED that the motion for immediate consideration be, and the same is hereby GRANTED;

IT IS FURTHER ORDERED that the motion to disqualify the panel be, and the same is hereby DENIED;

IT IS FURTHER ORDERED that the application for rehearing be, and the same is hereby GRANTED;

IT IS FURTHER ORDERED, after a review of the answer to the application for leave to appeal, that the order of this Court of August 20, 1976, be and the same is hereby AFFIRMED, and the cause is REMANDED for compliance with that order.

This Court retains no further jurisdiction.

[*Certification omitted in printing*]

ORDER REVERSING TRIAL COURT

(State of Michigan in the Court of Appeals)

(Aug. 20, 1976)

At A Session Of The Court Of Appeals Of The State Of Michigan, Held at the Court of Appeals in the City of Lansing, on the 20th day of August in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable Glenn S. Allen, Presiding Judge; Michael F. Cavanagh, Donald E. Holbrook, Jr., Judges.

(People of the State of Michigan, Plaintiff-Appellant, v Norman Arthur Paintman, Defendant-Appellee. No. 29587. L.C. # CR 76-27030)

In this cause an application for leave to appeal and a motion for oral argument are filed by plaintiff-appellant, and nothing in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED, pursuant to GCR 1963, 806.7, that the order of July 30, 1976 suppressing certain statements of defendant-appellee be, and the same is hereby REVERSED and SET ASIDE. After an examination of the

transcript of the *Walker* hearing, we are left with a definite and firm conviction that the statements of defendant-appellee of March 1, 1976 were voluntarily given and may be admitted at trial. *People* v *McGillen, #1*, 392 Mich 251, 257 (1974).

IT IS FURTHER ORDERED that the cause be REMANDED for trial.

IT IS FURTHER ORDERED that the motion for oral argument be, and the same is hereby DENIED as moot.

[*Certification omitted in printing*]

ORDER SUPPRESSING STATEMENTS OF THE DEFENDANT

(State of Michigan — Circuit Court
County of Oakland)

(July 30, 1976)

(People of the State of Michigan, Plaintiff, v Norman Paintman, Defendant. CR 76-27030 FY)

At a session of said Court, held in the Courthouse, in the City of Pontiac, County of Oakland, State of Michigan, on July 30, 1976.

Present: Honorable William J. Beer, Circuit Judge

This matter having come before the Court upon Defendant's Motion To Quash Confession, an evidentiary hearing having been had; argument having been had and the Court being advised in the premises:

IT IS HEREBY ORDERED that all statements made by Defendant are hereby held to be inadmissible as involuntary for the reasons set forth on the record by this Court on July 29 and 30, 1976.

IT IS FURTHER ORDERED that the People's Motion For Adjournment of the trial date is hereby denied.

/s/ William J. Beer, Circuit Judge

Approved as to form:
/s/ Elliott Hall
Attorney for Defendant

/s/ Robert C. Williams
Chief Appellate Counsel

ORAL PRONOUNCEMENTS OF TRIAL COURT ON REHEARING HOLDING RESPONDENT'S STATEMENTS INADMISSIBLE

(State of Michigan — Circuit Court — County of Oakland)

(July 30, 1976)

The Court: . . .Let me, in order to be helpful to you, because only the Judge can disclose what is lying on his mind and he only does that by putting it upon the record. I concluded after I heard the testimony of Captain Ritenour, that his handling of the warnings or Miranda warnings to Mr. Paintman on their first occasion was incomplete. That was when he was on the stand under direct examination. I also had a conclusion of mind that Paintman had made it clear under all the totality of the circumstances, to use that expression, that he didn't want to give any statements, that he did desire a lawyer and I had another conclusion of mind that in reference to what happened on March 1st that when it was presented to him again, the substance of the tape and the presentment to him after he had already said he didn't want to give any statements, that here was his alleged accomplice trying to put all of the blame on him. I had

the feeling that as a result of all of those circumstances it did not meet the test of a voluntary statement or confession, whatever it might be. I said in the beginning and I saw nothing wrong about Prosecutor Richard Thompson having him brought in for that 11 minutes and recording the tape, not recording the tape but having the tape played to him because at that time if I recollect the testimony of Mr. Thompson, that Mr. Paintman said again he didn't have anything to say. But it was the total of all of these circumstances that happened when the meeting of March 1st took place. Wasn't there a meeting on March 1st?

Mr. Hall: That's correct, Your Honor.

The Court: With Captain Ritenour who, as he said, just happened to go by to see him at the jail with Officer Simmons.

Now, I don't have to put in the record like this in front of learned counsel like you and eventually if this goes to the Appeals Court and those learned Judges, that we all understand so clearly that constitutional prohibition against a person incriminating themselves. We all know that. But he may give statements or give confessions if all these tests of voluntariness are met. And I thought they hadn't been met after I heard the testimony of the officers and I heard the testimony of Mr. Paintman. There are many (202) circumstances that I thought about. What the officer or Captain Ritenour wrote up, that was all done in his recollection, as I understood it, of what Paintman had to say to him, afterwards. I mean the statement was written up, typed up as a police report afterwards, isn't that true?

Mr. Covault: Yes.

The Court: Well, I want you to know that those thoughts were in my mind in the matter. I will let you

address me further with these conclusions as set forth here.

Mr. Covault: May I have a copy of the — the Court has my copy.

Before I turn myself, my attention to these matters. Do I understand the Court to be saying that insofar as Captain Ritenour is concerned, the Court chose to believe his testimony on direct examination but on re-direct didn't believe it?

The Court: I accepted as a version what he first said when he was on the stand, of what took place. As the more accurate version of what took place. This was — we're talking now, are we not, about the meeting on March 1st?

Mr. Covault: Yes.

(203) The Court: Alright.

Mr. Covault: I must observe that I find that a regrettable determination by the Court if there was some lack of communication between Captain Ritenour and I in the way I posed questions and the way he phrased answers, to let the Court make a credibility judgment on direct examination that I would have to submit is not warranted by the totality of the record.

Totally absent from the series of factual findings as Mr. Hall has before the Court, is any reference whatsoever to the testimony of Captain Ritenour that on two occasions he told Mr. Paintman that he would honor his request, provide him the opportunity to contact a lawyer. There is no reference to that whatsoever and I submit that the record does reflect that prior to the meeting with Richard Thompson and subsequent to the line-up, I believe, and before the arraingment, or after the arraignment that evening; in any event, that Captain Ritenour again told Mr. Paintman he would allow him to contact counsel if

he want the opportunity. I ask that the findings of the Court be made directly on that point.

I would ask all of the material (204) contained under the heading "Conclusions of Law" be stricken therein. In fact, they are conclusions of fact, now law. All that exists there is one bald citation to People versus Walker, which we all know is the reason we are here. What follows is a series of factual recitations that should be stricken because they are not conclusions of law, because they are incomplete. For example, in the second paragraph is the very item I bring to the Court's attention. The second full paragraph of "Conclusions of Law," second sentence: "No attempt to provide the defendant with counsel was made by either the Prosecutor's office or the Southfield Police Department." I submit that that is simply not in keeping with the state of the record. I am also concerned that the Court has indicated on the record that it felt that the actions of Mr. Thompson in playing the tape recording were valid and yet the whole premise for the involuntariness as the Court sees it of these statements is the playing of that same tape recording.

The Court: In the manner in which the Captain eventually made use of it. As to the totality of the circumstances.

Mr. Covault: It is not my (205) understanding of the record, that anybody has suggested that once the tape recording was played by Mr. Thompson, that it was ever again played.

The Court: No, you are right

Mr. Covault: Those are my observations about the proposed findings of fact and conclusions of law drafted by Mr. Hall. I would reassert to the Court that I once again ask the Court to address itself directly to the remarks made by Mr. Paintman in the presence of

Captain Ritenour and Lt. Simmons that were volunteered to them before any interrogation or advice of rights occurred.

The Court: Are we talking then, again, about March 1st?

Mr. Covault: Yes.

The Court: Thank you. Anything further over here?

Mr. Hall: Just a remark regarding Mr. Covault's last statement. I would think that anything elicted during that meeting especially anything said during prior to the proper advice of rights should per se be included.

Mr. Covault: The difficulty, of course, is that there was no elicitation of anything. (206) He had volunteered spontaneous remarks.

The Court: I examined the order proposed by the Prosecutor's office suppressing statements of the defendant and I am unable to accept it for these reasons:

As I have already indicated here and I will indicate again after listening to the testimony of Captain Ritenour, that I found the version which he testified to on direct testimony to be the correct one and I concluded it did not meet legal requirements. So therefore, I must reject the proposal that he was properly advised on March 1st, 1976, of his constitutional rights. But I also reject the proposal that the defendant was illegally confronted by a representative of the Oakland County Prosecutor's office by a tape recorded statement of his co-defendant, one William Kidd, on April 30, 1976. I don't have any recollection of that. April 30, 1976.

Mr. Hall: I am sure that that date is —

Mr. Covault: That is just a typographical error, Your Honor. February 27.

The Court: February 27. Quite to the contrary, and I want this in the record. I felt (207) that Mr. Richard Thompson, in his testimony, did nothing illegal in

having played back to Mr. Paintman the tape, portions of the tape, of William Kidd because as I recollect, Richard Thompson's testimony was that he asked him if he had anything to say and Paintman indicated nothing and then he wanted a lawyer. That was the end of it, as far as I recall. So I do not say that there was an illegal confrontration at that time.

Here is what I had in mind. And I will relate the circumstances afterwards. I found that in the totality of all the circumstances from the hour of arrest through the playing of the tape and then what happened over in the County Jail on March 1st, rendered the statements taken as not being voluntary in accordance with the constitutional rights of Norman Paintman. I recited in the transcript — not in the transcript but to the record, how he was arrested, where he was arrested, and I thought I did it quite carefully, in the early morning hours of February 27, 1976, which in itself is not an issue here on the voluntary or involuntary nature of this matter. I have already covered the part about Chief Assistant Prosecutor Richard Thompson.

Then I arrived at the conclusion (208) that considering all of these circumstances, testimony not only of Captain Ritenour but the testimony of Norman Paintman, as to how the statement was given and it was inadmissible.

Now, where do I leave any doubt in your mind, Mr. Covault, about my conclusions or did I for your appellate review, if that becomes necessary, have a clear-cut record here?

Mr. Covault: Well, just simply as an Officer of the court it's very difficult to draft an order where the Court's ruling is that based on the totality of the circumstances, something follows.

The Court: The totality of the circumstances being that Officer Ritenour brought into the discussion again

on March 1st, as I heard all of the testimony here, the matter of what Kidd had to say and the tape had been taken and then was played to Paintman.

Mr. Covault: His testimony was that he and Lt. Simmons agreed with him, near the conclusion of the interview with Mr. Paintman, there was reference to that but there is abundant material before that that I seek to get into evidence. The only way the Court could reach that judgment at least on the surface of (209) things, is to believe Mr. Paintman. Mr. Paintman, sure he told me, "Why'd you let Kidd put it all on your back?" If the Court chooses to believe Mr. Paintman, so be it. Two officers testified that issue didn't come up until well beyond the critical point.

The Court: Who has the burden here of proving the voluntary nature of these statements?

Mr. Covault: I do.

The Court: That's right and I don't think you met that burden. I said in the summary of all of the testimony including Mr. Paintman's testimony but again, let's you and I not stray into should I say just — I don't mean to say arguments. You have been very polite.

Mr. Covault: I am trying to express my concern about the Court's findings of fact. If the Court's findings are that the totality of the circumstances lead to involuntariness, I will have to deal with that in whatever best way I can.

The Court: That's what it was, was the totality of all of these circumstances and subsequent injection into the meeting on March 1st, between the officers and Mr. Paintman on this tape.

(210) Mr. Covault: Judge, you suggest that it is and under the law it is my burden to persuade. Frankly, I saw no purpose in making argument on the impact of the remark about or the reference back to the tape when

by everybody's concession that occurred so far down into this statement, well after Mr. Paintman had acknowledged that he shot people, all of the critical people were out and on the record.

How can that then look back in time to infect the whole statement? I fail to see that. Apparently I was remiss in my obligations to the Court but I fail to see that as a matter of logic or of law.

The Court: Well, I have already placed in this record the factual findings. I did that yesterday about the different dates. I think you heard all of that. I don't know what else there is for me to do in this matter. I cannot accept Mr. Hall, your statement or conclusion of law, that first paragraph when you say that upon the playing of the tape confession was so coercive. I don't believe that the playing of that taped confession or that taping was in itself, when it was given, as coercive. It was what followed afterwards. Do you have any comment to make upon that?

Mr. Hall: I would have an (211) objection on that, of course. I thought by my last paragraph that I on the third page, that based on the above the Court finds — I am referring specifically in that paragraph to the Court has said in the totality of all the circumstances. I have said, based on the above, the Court finds, et cetera.

The Court: It would be very easy to misunderstand that paragraph.

Mr. Hall: All right.

The Court: I think it should be re-drawn

Mr. Hall: All right, Your Honor.

The Court: I do also conclude that Mr. Paintman on at least two occasions and he did on February 27, request counsel. I am satisfied that he wanted counsel.

Mr. Covault: I will repeat my request of the Court to make a finding in respect to the testimony that he was also provided twice on that day with an opportunity to contact counsel.

The Court: No. I cannot reach that conclusion in the testimony I heard. Having in mind again, that he was a prisoner and I heard, I think it was, Captain Ritenour say something to that effect but (212) there was no clear-cut effort made to allow him to and get counsel. I mean, being taken to a telephone or something like that. I don't recall that at all. Was that in the record?

Mr. Covault: Yes. Please don't misunderstand me. What was in the record, as I recall, was that on the morning before Mr. Paintman was brought to Mr. Thompson's office, that Captain Ritenour told him that he could use a telephone, that he would give him a telephone to contact a lawyer if he wanted to. To that there is no response.

Mr. Hall: Your Honor, I fail to recall the specific situation that Mr. Covault presents to the Court as testified to by Captain Ritenour. I do know that there are two very clear and specific requests for counsel. That is uncontested in this case. Perhaps Mr. Covault wants to balance that off by indicating that the specific requests made on two specific occasions made on February 27, were balanced by Captain Ritenour's indication that despite what Mr. Paintman had said in open court and in front of chief Assistant Prosecutor Thompson, he refused to carry that out. I choose to believe and want to present to the Court I don't believe it ever happened and I think it is quite (213) realistic that a police officer would say as I indicated yesterday and I don't see how Mr. Covault could say Mr. Paintman would manufacture this, when he made a request for counsel to Captain Ritenour, Captain Ritenour indicated that, "What do you need an

attorney for, all he's going to tell you is to keep your mouth shut, that you'll get in more trouble than you are now" and I don't think that's a contrived and manufactured statement on the part of Mr. Paintman. I think it's very realistic. That's exactly what Mr. Paintman testified to the other day.

The Court: Well, gentlemen, the reason we have a record is so that Courts and counsel do not err. But right from the beginning and I say that this is my conclusion of the testimony, the testimony of Mr. Paintman, yes, and the testimony of Captain Ritenour and the testimony of Mr. Richard Thompson that Paintman did not intend to waive his constitutional rights, that he intended quite to the contrary, that he was going to assert his rights and as I have already said, he heard this tape and by a subsequent visit of the police officers I think that was on March 1st, over in his cell in the County Jail, a change [*sic*] took place and that's where the Court brought in the tape. The tape was then used (214) subsequently.

Now, gentlemen, I will stand on the ruling that I made yesterday that the confessions or statements, which I have not read, will not be used at the trial but that is as far as my ruling went and won't go any further than that.

Mr. Covault: Your Honor, this won't be the first case I have had some trouble communicating my position to the Court. Looking, however, for a ray of sunshine wherever I can find it, I will reiterate that I have a request before this Court that the Court consider granting the admissibility of the statements volunteered by Mr. Paintman to the officers before there was any reference to the tape.

The Court: Wasn't it all given at one time?

Mr. Covault: No, Your Honor.

The Court: Which one are you talking about?

Mr. Covault: What I am talking about is the testimony showed in my judgment that the police officers and Mr. Hall can correct me if I am wrong, the police officers came into the interview room. They said they asked him some general questions about his (215) health. He said he felt better. There was colloquy about that. They said they wanted to ask him some questions about the case. They never asked him any questions. He then started talking and said certain things to them that are incorporated in People's Exhibit 1. They said, "Wait a minute, Mr. Paintman, we must advise you of your rights." After he was advised of his rights we could argue with counsel all day long whether he was interrogated or whether there was conversation. He gave a narrative.

The Court: This was on March 1st?

Mr. Covault: This was on March 1st. But this is long before by anybody's assertion there was any reference to the Kidd tape by the officers, the threshold remarks.

The Court: This was after he had heard the tape and he had more than once and I do so find said that he didn't want to talk and he wanted counsel. Isn't that true?

Mr. Covault: Agreed.

The Court: And the only thing that I heard up to that point was that the officers went there to see to his state of health, wasn't that it? (216) Is that the reason they visited on March 1st?

Mr. Covault: They went there to interrogate him, ask him questions.

The Court: I thought there was something in the tesstimony to the effect they checked up to see that always their prisoners were being well cared for. Didn't I hear that?

Mr. Covault: There was testimony about the Captain seeing Mr. Paintman at the Southfield Jail for that reason.

The Court: Well, so be it.

Mr. Covault: Is the Court then saying that anything said by Mr. Paintman on that day is inadmissible?

The Court: That's right. By the way, there was only one interview on that day?

Mr. Covault: There was only one period of time in which the officers were present with Mr. Paintman.

The Court: That's what I mean, one total interview. Is that your understanding of it, Mr. Hall?

Mr. Hall: That's correct, Your Honor.

ORAL RULING OF TRIAL COURT HOLDING RESPONDENT'S STATEMENTS INADMISSIBLE

(State of Michigan — Circuit Court — County of Oakland)

(July 29, 1976)

The Court: It is my conclusion both factually and as a matter of law, under all the testimony that I have heard, that the statement given by Paintman, March 1st, under these circumstances amounted to a non-voluntary statement and may not be used at the trial. I do believe that the prior circumstances of the arrest and then the playing of the tape could well have induced what happened on March 1st. So to that extent Mr. Hall, the motion is granted on this so-called Walker hearing. I also will dispose of the motion to quash and that has been considered by this Court and I feel that that is without merit and it is denied.

Opposition

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IN THE

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OCTOBER TERM, 1981

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Petitioner,

-vs-

NORMAN PAINTMAN,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

RESPONDENT'S BRIEF IN OPPOSITION

STATE APPELLATE DEFENDER OFFICE

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the Michigan Supreme Court err in holding that the decision in Edwards v Arizona applied to Respondent's case?

TABLE OF CONTENTS

QUESTION PRESENTED..... i

INDEX OF AUTHORITIES..... ii

COUNTERSTATEMENT OF THE CASE..... 1

REASONS WHY THE WRIT SHOULD BE DENIED..... 3

The Michigan Supreme Court correctly held that Edwards v Arizona applied to Respondent's case.

RELIEF REQUESTED..... 5

INDEX OF AUTHORITIES

CASES

Connecticut v Smith, 102 S Ct 1441 (1982)..... 4

Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 LEd2d 378 (1981). 2

Leuschner v Maryland, 101 S Ct 3001 (1981)..... 4

Linkletter v Walker, 381 US 618, 636; 87 S Ct 1731; 14 LEd2d 601 (1965)..... 3

Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 LEd2d 694 (1966)..3

People v Paintman, 412 Mich 518; 315 NW2d 418 (1982)..... 1

Richardson v State, ___ Ark ___; 625 SW2d 504, 506-507 (1981).. 4

State v Shea, ___ La ___; ___ So2d ___ (1982)..... 4

Stovall v Denno, 388 US 293, 297; 87 S Ct 1967; 18 LEd2d 1199 (1967)..... 3

Stumes v Solem, 671 F2d 1150 (CA 8, 1982)..... 4

United States ex rel Kimes v Greer, 527 F Supp 307, 309 (ND Ill, 1981)..... 4

United States v Dillon, 11 MJ 922 (1981)..... 4

United States v Hinckley, 525 F Supp 1342 (DC, 1981)..... 4

White v Finkbeiner, 101 S Ct 3000 (1981)..... 4

Williams v Ohio, 101 S Ct 3073 (1981)..... 4

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ON PETITION FOR WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Norman Paintman respectfully requests this Court to deny the petition for a writ of certiorari seeking review of the Michigan Supreme Court's opinion in People v Paintman, 412 Mich 518; 315 NW2d 418 (1982).

COUNTERSTATEMENT OF THE CASE

Petitioner's statement is accepted with the following additions and exceptions.

After a pre-trial evidentiary hearing, the trial judge suppressed the statement respondent made to the police. The judge stated that it was his conclusion "both factually and as a matter of law, under all the testimony that I have heard," that respondent's statement was involuntary (Petitioner's Appendix at 62, 68; hereinafter cited as App). The trial judge found that the prosecutor had not met his burden of proving the statement

voluntary (App 63). The judge also found that respondent had not been properly advised of his Miranda rights before he gave his statement; that respondent had requested a lawyer "on at least two occasions"; that respondent did not want to talk and wanted a lawyer; and that no effort had been made by the police to provide him with a lawyer (App 57, 61, 64-65, 67). The trial judge said that he based his decision on the testimony of all the witnesses, including respondent Paintman (App 62, 63, 66).

Pursuant to the order of the Michigan Court of Appeals reversing the trial judge, respondent's statement was admitted against him at trial. The Michigan Supreme Court subsequently reversed respondent's convictions in a unanimous opinion. The issue decided by the Court was "the admissibility of a statement made by an accused in police custody who had asked for an attorney." (App 32). People v Paintman, 412 Mich 518, 522; 315 NW2d 418 (1982). The Court held that this Court's decision in Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 LEd2d 378 (1981), was controlling in this case and required reversal of respondent's convictions (App 36). Because the Court reversed on the Edwards issue, "we do not decide the other issues raised." (App 41).

REASONS WHY THE WRIT SHOULD BE DENIED

THE MICHIGAN SUPREME COURT CORRECTLY HELD THAT EDWARDS V ARIZONA APPLIED TO RESPONDENT'S CASE.

The petitioner contends that the Michigan Supreme Court incorrectly held that Edwards v Arizona, supra, was applicable to this case. The petitioner argues that the holding is contrary "to the well established doctrine that judicially-created rules of procedure which implement constitutional rights may be given prospective effect only." (Petition 20). The petitioner refers to "[t]he new standards of criminal procedure in Edwards...." and proceeds to make a standard retroactivity argument, using the often-stated, three-part test for determining prospective versus retroactive effect (App 21). See Stovall v Denno, 388 US 293, 297; 87 S Ct 1967; 18 LEd2d 1199 (1967); Linkletter v Walker, 381 US 618, 636; 87 S Ct 1731; 14 LEd2d 601 (1965).

The petitioner's argument falls on its premise. Edwards v Arizona, supra, did not announce a new standard. Edwards involved an application of Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 LEd2d 694 (1966), which was decided ten years before respondent made his statement to the police. In Miranda this Court explicitly announced:

> "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 US at 474.

In its opinion in the instant case, the Michigan Supreme Court treated the retroactivity question succinctly:

> "The Edwards Court took pains to establish that it was not announcing new law, but only clarifying further the dictates of existing law.
>
> 'Because the use of Edwards' confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments as construed in Miranda v Arizona, supra, we reverse the judgment ***.' (Emphasis added.) Edwards, ___.

> The Court later recited a parade of cases that supported the proposition of Miranda that 'the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present".'
>
> The Court concluded the discussion by noting that '[w]e reconfirm these views and to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel'. Id, ___.
>
> Thus, it is unnecessary to analyze the question of retroactivity under traditional standards." (App 40-41). People v Paintman, supra, 412 Mich at 530-531.

This Court has indicated that Edwards is to have retroactive effect. Upon petitions for writ of certiorari by numerous petitioners-defendants, this Court has vacated the judgments below which were entered before Edwards was decided and has remanded "for further consideration in light of Edwards v. Arizona, ..." E.g., Williams v Ohio, 101 S Ct 3073 (1981); White v Finkbeiner, 101 S Ct 3000 (1981); Leuschner v Maryland, 101 S Ct 3001 (1981), and the orders following Leuschner. This Court has already denied certiorari to the state in at least one case involving this question. Connecticut v Smith, 102 S Ct 1441 (1982)[30 Cr L 4213; February 24, 1982].

In addition, most courts are applying Edwards to statements taken before Edwards was decided. Application of Edwards is so clearly required that the courts do not even bother discussing a supposed retroactivity problem. E.g., Stumes v Solem, 671 F2d 1150 (CA 8, 1982); United States ex rel Kimes v Greer, 527 F Supp 307, 309 (ND Ill, 1981); United States v Hinckley, 525 F Supp 1342 (DC, 1981); United States v Dillon, 11 MJ 922 (1981); Richardson v State, ___ Ark ___; 625 SW2d 504, 506-507 (1981). Contra, State v Shea, ___ La ___; ___ So2d ___ (1982) [30 Cr L 2411; March 3, 1982].

The requirements of Miranda were stated ten years before respondent Paintman was arrested. The Michigan Supreme Court was correct in applying Miranda and Edwards to respondent's case. No useful purpose would be served by this Court granting certiorari.

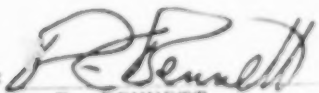
RELIEF REQUESTED

WHEREFORE, in light of the foregoing reasons, Respondent Norman Paintman requests this Court to deny the Petition For A Writ Of Certiorari; in the alternative, if this Court ultimately reverses the Michigan Supreme Court, then Respondent requests a remand to that Court for consideration of the issues raised in his appeal that were not discussed by that Court.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

Attorneys for Respondent

BY: 

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Dated: May 3, 1982

No. 81-1833

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF MICHIGAN

Petitioner,

-vs-

NORMAN PAINTMAN,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN

PROOF OF SERVICE

I, P. E. Bennett, being first duly sworn, depose and say that on May 3, 1982, I placed Respondent's Motion For Leave To Proceed In Forma Pauperis, Affidavit of Indigency, Brief In Opposition, and Proof of Service in the United States Mail with proper first class postage affixed and addressed to:

L. Brooks Patterson
Oakland County Prosecutor
1200 North Telegraph Road
Pontiac, MI 48053
(1 copy)

Clerk
United States Supreme Court
1 First Street, N. E.
Washington, D. C. 20534
(original and 9 copies)

P. E. BENNETT

Subscribed and sworn to before me
this 3rd day of May, 1982.

CAROL A. ORSBORN, Notary Public
Ingham County, Michigan
My Commission Expires: 7/24/83

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT OF INDIGENCY

PROOF OF SERVICE

STATE APPELLATE DEFENDER OFFICE

Attorneys for Respondent

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Dated: May 3, 1982

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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Norman Paintman, is an inmate in the State Prison of Southern Michigan at Jackson, Michigan. He asks leave to file the attached Brief in Opposition to a Petition for a Writ of Certiorari to the Supreme Court of the State of Michigan and to proceed in forma pauperis pursuant to Rule 46.

The respondent's affidavit in support of this motion is attached hereto. He has been indigent and represented by appointed counsel during all the trial and appellate court proceedings in this case.

STATE APPELLATE DEFENDER OFFICE

Respectfully submitted,

Attorneys for Respondent

BY: P. E. Bennett

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Dated: May 3, 1982

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

No. 81-1833

STATE OF MICHIGAN,

Petitioner,

vs.

NORMAN PAINTMAN,

Respondent.

AFFIDAVIT OF INDIGENCY

STATE OF MICHIGAN)
) SS
COUNTY OF JACKSON)

I, NORMAN PAINTMAN, being first duly sworn according to law, depose and say in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the respondent in the above entitled case.

2. Because of my poverty, I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

I was convicted of four counts of first degree murder and sentenced to life imprisonment in a state penitentiary by the Oakland County Circuit Court. During all the trial and appellate court proceedings in this case, I have been indigent and represented by appointed counsel. The present proceeding was commenced on a petition for a writ of certiorari to the Supreme Court of the State of Michigan to reverse that Court's opinion and order reversing my convictions and ordering that I receive a new trial. Respondent is opposing that petition.

NORMAN PAINTMAN

Subscribed and sworn to before
me this 24th day of April, 1982.

NOTARY PUBLIC Morris Martin
Jackson County, Michigan
My Commission Expires: 5/30/84

Petitioner's Reply Brief

Office - Supreme Court, U.S.
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...EVAS.

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	Page
Index to Authorities	i
Statement of the Case	1
Reply Argument	2
Supplemental Argument	4
Relief Requested	5

INDEX TO AUTHORITIES

Doyle v Ohio, 426 US 610 (1976)	4
Edwards v Arizona, 451 US 477 (1981)	2,3,4
Fletcher v Weir, 102 S Ct 1309 (1982)	4
Jenkins v Anderson, 447 US 231 (1980)	4
Miranda v Arizona, 384 US 436 (1966)	2,3,4

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PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

Respondent emphasized in his Brief in Opposition, from among a number of pronouncements which the trial court made regarding the admissibility of his confession, the trial court's statement to the effect that Respondent had not been properly advised of his *Miranda* rights before he gave his confession on March 1, 1976 (Pet. App. 57, 61). At the hearing on the admissibility of Respondent's confession, Respondent's attorney asked Captain Ritenour on direct examination

whether he had advised Respondent of his *Miranda* rights (H. 42, 46-47), and also asked him whether he had advised Respondent of certain specific rights (but he omitted, either inadvertently or as a matter of pre-trial tactics, any mention of the right to court-appointed counsel) (H. 47-49). Ritenour stated in all cases that Respondent had been so advised (H. 42, 46-49).

On cross-examination, the prosecutor asked Captain Ritenour whether he had advised Respondent of each specific *Miranda* right. Captain Ritenour testified that he had, and that Respondent had waived those rights (H. 55, 62-64).

Respondent testified that Ritenour advised him of his rights on March 1, 1976, but he was not asked specifically about each right (H. 115, 120, 131).

The trial judge said in his ruling, without elaboration, that he found Captain Ritenour's version on direct examination "to be the correct one" (Pet. App. 61) and that the warnings were "incomplete" and therefore improper (Pet. App. 57, 61). This issue was briefed and argued before the Michigan Supreme Court, but was not discussed or decided in the opinion below.

REPLY ARGUMENT

The State of Michigan is asking this Court to review a judgment of the Supreme Court of Michigan which reversed Respondent's convictions under *Miranda* v *Arizona*, 384 US 436 (1966), and *Edwards* v *Arizona*, 451 US 477 (1981). We argued in our petition for certiorari that the requirements of *Miranda* are overbroad insofar as they posit a Constitutional right to remain silent and thereby protect the interest which the guilty have in

avoiding conviction, as opposed to the legitimate right or privilege against compulsory self-incrimination which the guilty have. We also contended that a test which focuses upon whether a confession was compelled or coerced would better serve to distinguish between the rights and the interests or "needs" of the accused, and in in addition would have the virtue of beginning the inquiry into the question of confessions and interrogation with a construction of the Constitutional language which authorizes federal judicial action in this area. Respondent's brief in opposition did not address these claims.

Respondent did, however, address our contention that *Edwards* v *Arizona, supra*, should not be given retroactive effect. He stated that we had offered the "standard" argument, based upon "the often-stated, three-part test" for determining retroactivity, and he correctly observed that the Michigan Supreme Court, like other courts in the cases he cited, did "not even bother" to discuss a "supposed" retroactivity problem. Those courts appear to have reasoned that, since *Edwards* was decided under *Miranda*, then, even assuming for the sake of argument that *Edwards* was not retroactive, the case at hand would be decided under *Miranda* as well, and must necessarily be decided with the same result as *Edwards*.

Petitioner did make that standard argument, because it is thoroughly grounded in the decisions of this Court. However, we also contended that police officers, when confronted by an ambiguity in federal Constitutional requirements, should be permitted to resolve that ambiguity in favor of what they understand to be the public interest, until such time as the question is authoritatively settled by this Court.

The Court in *Miranda* stated that, once an accused has invoked his Fifth Amendment right to counsel during questioning, "the interrogation must cease until an attorney is present." 384 US, at 474. The question which *Miranda* did not answer was whether, once a suspect has asserted that right, the police may ask him at a later time if he is willing to waive his right to counsel and answer questions or make a statement. The fact that this Court gave the issue plenary consideration in *Edwards* v *Arizona, supra*, is a good indication, if it is not proof positive, that the question had been unsettled until *Edwards*. In short, police officers and their legal advisors should not have been expected to know what the Supreme Court of Arizona did not know.

SUPPLEMENTAL ARGUMENT

On March 22, 1982, this Court decided *Fletcher* v *Weir*, 102 S Ct 1309 (1982), in which the Court recognized, as it did in *Jenkins* v *Anderson*, 447 US 231 (1980), that a suspect's silence in the face of incriminating circumstances may be of some probative value, at least for impeachment purposes if not as substantive evidence. Petitioner contends that *Fletcher* v *Weir, supra*, thus lends some support to the proposition that a suspect may, consistent with the compulsory self-incrimination clause of the Fifth Amendment, be told that his failure to respond to the evidence against him will be used in the determination of his guilt or innocence, provided that he is not assured implicitly that his silence will not be used against him within the meaning of *Doyle* v *Ohio*, 426 US 610 (1976).

RELIEF REQUESTED

WHEREFORE, the Petitioner prays that this Honorable Court reject the arguments offered in Respondent's brief in opposition, grant our petition for a writ of certiorari, and reverse the judgment of the Supreme Court of Michigan.

Respectfully submitted,

L. Brooks Patterson
Prosecuting Attorney
Oakland County, Michigan

May 11, 1982